

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND ) MDL NO. 13-02419-FDS  
COMPOUNDING )  
PHARMACY CASES LITIGATION )  
)  
)  
)  
)  
)  
)

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE/MOTION HEARING

John Joseph Moakley United States Courthouse  
Courtroom No. 2  
One Courthouse Way  
Boston, MA 02210

May 14, 2013  
2:00 p.m.

Valerie A. O'Hara, FCRR, RPR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way, Room 3204  
Boston, MA 02210  
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiffs:

3 Hagens, Berman, Sobol, Shapiro LLP, by THOMAS M.  
4 SOBOL, ESQ. and KRISTEN JOHNSON PARKER, ATTORNEY,  
5 55 Cambridge Parkway, Suite 301, Cambridge,  
6 Massachusetts 02142;

7  
8 Ellis & Rapacki LLP, by FREDRIC L. ELLIS, ESQ.,  
9 85 Merrimac Street, Suite 500, Boston,  
10 Massachusetts 02114;

11  
12 Robinson & Cole, LLP, KIMBERLY A. DOUGHERTY,  
13 ATTORNEY, One Boston Place, Suite 2500, Boston,  
14 Massachusetts 02108;

15  
16 Lieff, Cabraser, Heimann & Bernstein, LLP, by  
17 MARK P. CHALOS, ATTORNEY, One Nashville Place,  
18 159 Fourth Avenue, North, Suite 1650, Nashville,  
19 Tennessee 37219-2423;

20  
21 Andrews Thornton, by ANNE ANDREWS, ATTORNEY, ESQ.,  
22 2 Corporate Park, Suite 110, Irvine, California 92606;

23  
24 Brown Rudnick, by DAVID J. MOLTON, ESQ., Seven Times  
25 Square, New York, New York 10036;

Cohen, Placitella & Roth, P.C., by MICHAEL COREN,  
ESQ., Two Commerce Square, 2001 Market Street, Suite  
2900, Philadelphia, Pennsylvania 19103;

Sugarman, Rogers, Barshak & Cohen, P.C., by ANTHONY  
V. AGUDELO, ESQ., 101 Merrimac Street, 9th Floor,  
Boston, Massachusetts 02114;

Lipton Law, by MARC E. LIPTON, ESQ., 18930 West Ten  
Mile Road, Suite 3000, Southfield, Missouri 48075;

Law Office of Hugo & Associates, MICHAEL R. HUGO,  
ESQ., 1 Catherine Road, Framingham, Massachusetts  
01701;

Gentry, Locke, Rakes & Moore, LLP, by J. SCOTT  
SEXTON, ESQ., 10 Franklin Road, S.E., Suite 800  
P. O. Box 40013, Roanoke, Virginia 24022-001

1 APPEARANCES (CONTINUED):

2 For the Defendants:

3 Harris Beach PLLC, by FREDERICK H. FERN, ESQ. and,  
4 JESSICA EICHEL, ATTORNEY, 100 Wall Street, New York,  
New York 10005;

5 Hinshaw & Culbertson LLP, by DANIEL E. TRANEN, ESQ.,  
6 28 State Street, 24th Floor, Boston, Massachusetts  
02109;

7 Tucker & Ellis LLP, by MATTHEW P. MORIARTY, ESQ.,  
8 1150 Huntington Building, 925 Euclid Avenue, Cleveland,  
Ohio 44115-1414;

9 Donoghue, Barrett & Singal, P.C., by MICHELLE R.  
10 PEIRCE, ATTORNEY, ESQ., One Beacon Street, Boston,  
Massachusetts 02108-3106;

11 Michaels, Ward & Rabinovitz LLP, by DAN RABINOVITZ,  
12 ESQ., One Beacon Street, Boston, Massachusetts 02108;

13 Todd & Weld LLP, by HEIDI A. NADEL, ESQ.,  
28 State Street, 31st Floor, Boston, Massachusetts  
14 02109;

15 Duane Morris LLP by MICHAEL R. GOTTFRIED,  
ESQ., 100 High Street, Suite 2400, Boston, Massachusetts  
16 02110-1724;

17 Lawson & Weitzen, LLP, by RYAN A. CIPORKIN, ESQ.,  
88 Black Falcon Avenue, Boston, Massachusetts 02210;

18 Ulmer & Berne, by JOSEPH P. THOMAS, ESQ., 600 Vine  
19 Street, Suite 2800 Cincinnati, Ohio 45202;

20 Curley & Curley P.C., ROBERT A. CURLEY, JR.,  
ESQ., 27 School Street, Boston, Massachusetts 02108;

21 INTERESTED PARTY:

22 United States Attorney's Office, by ZACHARY A. CUNHA,  
23 ESQ., Suite 9200, 1 Courthouse Way, Boston,  
Massachusetts 02210

24 VIA PHONE:

25 Frith & Ellerman Law Firm, P.C., by ROB DEAN, ESQ.,  
P.O. Box 8248, Roanoke, Virginia 24014;

APPEARANCES (CONTINUED) VIA PHONE:

ELLIOT L. OLSEN, ESQ., 2950 Radisson Plaza Seven,  
45 South 7th Street, Minneapolis, Minnesota 55402-1650;

THOMAS MARTIN, ESQ., 21st Floor, 1845 Walnut Street,  
Philadelphia, Pennsylvania 19103;

LichtensteinFeinwick, PLC, by JOHN LICHTENSTEIN, ESQ.  
and GREG LYONS, ESQ., 101 S. Jefferson Street,  
Suite 400, P.O. Box 601, Roanoke, Virginia 24004-0601;

Terry Dawes

Patrick Fennell

Paul Sand

Randy Kinnard

Wendy Fleishman

Melvin Wright

Elisha Hawk

Steve Resnick

Daniel Clayton

Sharon Houston

Jonathan Nace

Brady Rife

Sean Roth

Chris Cain

Mark Dancer

Dan Myers

Tim Housholder

Mary Gidaro

Robert Sickels

Terry Cochran

Rebecca Blair

Alyson Oliver

Will Riley

Mark Zamora

Regina Phandanouvong

John Alexander

Patrick Montoya

Mitchell Toups

Yvonne Flaherty

Jonathan Krohnfeldt

David Rashid

Doug Jones

Bryan Bleichner

Greg Lyons

Kristi Osterday

Robert Dean, George Nolan, John Belcher  
and Nolan Nicely

PROCEEDINGS

THE CLERK: All rise. Thank you, all.  
Please be seated. Court is now in session in the matter  
of in re: New England Compounding Pharmacy,  
Incorporated Products Liability Litigation. This is  
Case Number 13-MD-02419. Counsel, please note your  
appearances for the record.

MS. PARKER: Good morning, your Honor,  
Kristen Johnson Parker for the plaintiffs' steering  
committee.

THE COURT: Good afternoon.

MR. SOBOL: Good afternoon, your Honor,  
Tom Sobol for the PSC.

MR. CHALOS: Mark Chalos on behalf of the  
PSC.

MR. LIPTON: Marc Lipton on behalf of the  
PSC.

MS. DOUGHERTY: Good afternoon, your Honor,  
Kim Dougherty on behalf of the PSC.

THE COURT: Good afternoon.

MR. SEXTON: Good afternoon, your Honor,  
Scott Sexton on behalf of the Roanoke, Virginia  
plaintiffs.

THE COURT: Good afternoon.

MR. MOLTON: Good afternoon, your Honor,

1 David Molton on behalf of the statutory creditors'  
2 committee.

3 THE COURT: Good afternoon.

4 MS. ANDREWS: Good afternoon, your Honor,  
5 Anne Andrews creditors' committee, also plaintiffs.

6 THE COURT: Good afternoon.

7 MR. ELLIS: Rick Ellis, various plaintiffs.

8 MR. COREN: Good afternoon, Mike Coren on  
9 behalf of the statutory creditors' committee, co-chair.

02:02PM 10 MR. GOTTFRIED: Michael Gottfried for the  
11 trustee.

12 MS. EICHEL: Good afternoon, your Honor,  
13 Jessica Eichel for the trustee.

14 MR. TUCKER: Good afternoon, your Honor,  
15 Scott Tucker for Ameridose.

16 MS. PEIRCE: Michelle Peirce, Barry and  
17 Lisa Cadden, your Honor.

18 MR. MORIARTY: Matthew Moriarty for  
19 Ameridose. Good afternoon, your Honor.

02:02PM 20 MS. NADEL: Good afternoon, your Honor,  
21 Heidi Nadel for Doug and Carla Conigliaro.

22 MR. RABINOVITZ: Dan Rabinovitz on behalf of  
23 Medical Sales Management, Inc. Good afternoon, your  
24 Honor.

25 THE COURT: Good afternoon.

1 MR. TRANEN: Daniel Tranen for NECC.

2 MR. FERN: Good afternoon, Judge,  
3 Frederick Fern for NECC.

4 MR. CUNHA: Good afternoon, your Honor,  
5 Zachary Cunha for nonparty, United States of America.

6 MR. CIPORKIN: Good afternoon, Ryan Ciporkin  
7 for Alaunus Pharmaceuticals.

8 MR. THOMAS: Joe Thomas, your Honor, on  
9 behalf of GDC.

02:03PM 10 MR. CURLEY: Good afternoon, your Honor,  
11 Robert Curley for GDC.

12 THE COURT: All right. Good afternoon, and  
13 good afternoon to everyone on the telephone. We have,  
14 as I see it, at least three things of some significance,  
15 one of great significance that I want to talk about  
16 today. The principal issue is the trustees' motion to  
17 transfer and the various related motions for abstention  
18 to withdraw the reference to remand and so on.

19 The second issue is the trustees' motion  
02:03PM 20 seeking limited relief from the protective order  
21 essentially permitting it to cancel Lisa's and whatnot  
22 with regard to equipment and property, and the third is  
23 the plaintiffs' steering committee's motion to partially  
24 lift the discovery protective order to proceed, and we  
25 have, of course, other matters, odds and ends and

1 housekeeping matters to address as well.

2 What I propose to do is to try to have an  
3 orderly discussion on what I'm going to call for the  
4 sake of convenience the trustee's motion to transfer. I  
5 have, I think, read everything. I have to say given how  
6 complicated the docket is, I have something less than  
7 100 percent confidence I've read everything, but I think  
8 I've read everything, including Judge Wilson's opinion.

9 I was distracted last night by what turned  
02:04PM 10 out to be a terrific hockey game. Roanoke and such  
11 parts, you're really missing out, I have to say, just a  
12 great game, and I found it more interesting than the  
13 bankruptcy code, but I do want to have an orderly  
14 discussion of that, if I can.

15 To cut to the chase, I'm not prepared to  
16 rule from the bench because I need to think about this  
17 some more, although I think I do need to rule with some  
18 alacrity. There are, I think, four attorneys who want  
19 to be heard by phone. What I want to do is to have a  
02:05PM 20 discussion first in open court and then permit a brief  
21 opportunity for supplemental argument by phone, which,  
22 again, I hope none of this is repetitive.

23 I'm not quite sure how to structure this,  
24 but I think what I would propose is that we just jump  
25 into this, and I should probably hear from counsel for



1 the trustee first, but let me first check with lead  
2 counsel and see if there's something else that we ought  
3 to do first.

4 Ms. Parker, Mr. Sobol.

5 MS. PARKER: That's fine with us, your  
6 Honor, thank you.

7 MS. EICHEL: May I argue the motion?

8 THE COURT: Yes. Please argue somewhere  
9 where there's a microphone so everyone can hear you.

02:06PM 10 MR. FERN: Judge, if I may, I'd like to  
11 introduce Jessica Eichel. She's an associate in my  
12 office. She'll be arguing the motion on behalf of the  
13 trustee.

14 THE COURT: Are you now representing the  
15 trustee? It's not clear to me, Mr. Fern.

16 MR. FERN: Judge, there's a motion pending  
17 before Judge Boroff for a special appointment. That has  
18 not yet been adjudicated, so I'm working under full  
19 authority of the trustee though.

02:06PM 20 THE COURT: All right, go ahead.

21 MS. EICHEL: Good afternoon, your Honor, my  
22 name is Jessica Eichel. I'm an attorney at Harris,  
23 Beach, proposed counsel for the trustee.

24 The trustee moved to transfer to this  
25 district all actions relating to injuries arising from

1 the alleged contamination of the injectable steroid.  
2 This is directly on point with this Court's mandate to  
3 coordinate the entirety of this litigation and ensure  
4 compensation for all plaintiffs in an equitable manner,  
5 and in order to do so, we need all cases before this  
6 Court.

7 The bulk of the motion is unopposed. No one  
8 disputes that this Court has jurisdiction over cases  
9 naming the debtor and all affiliated entities and  
10 individuals.

02:07PM

11 Where the dispute lies, in what is called by  
12 the plaintiffs' steering committee a narrow subset of  
13 cases, those that do not name the debtor or its  
14 affiliates, but we would submit, your Honor, that this  
15 purportedly narrow subset of cases has the potential to  
16 unravel much of what the Court and all of the parties  
17 hope to accomplish and what the bankruptcy code was  
18 designed for, the efficient and equitable administration  
19 of the estate.

02:08PM

20 At the forefront of the argument against  
21 transfer are the Roanoke, Virginia plaintiffs  
22 represented by the Gentry, Locke firm. As you mentioned  
23 earlier, this past Friday, a Judge in the Western  
24 District of Virginia remanded several of these cases to  
25 state court. The trustee stands firm that these and all

1 cases should be transferred because they are related to  
2 the bankruptcy case.

3 Notably, Judge Wilson did not come to a  
4 decision on "related to" jurisdiction. He assumed that  
5 it existed for the sake of his analysis. Frankly, the  
6 policy considerations that are before this Court are  
7 well beyond the jurisdictional considerations that were  
8 before Judge Wilson when he issued his decision, whose  
9 primary rationale for remand was that the removals were  
10 untimely.

02:09PM

11 Indeed, your Honor has a mandate and  
12 authority that far exceeds any other court to coordinate  
13 all litigation related to the outbreak as the JPML  
14 intended with the arsenal of tools provided by  
15 bankruptcy code.

16 If I may, I'd like to talk about "related  
17 to" jurisdiction.

18 THE COURT: All right. Let me, at the risk  
19 of stating the obvious, I can't do something just  
20 because it's practical or efficient or it makes sense, I  
21 have to have jurisdiction, I have to follow these  
22 statutes which fit together somewhat less than  
23 perfectly, and there are other considerations as well,  
24 including economy and respect for state court systems  
25 and other considerations, which may be trumped at the

02:09PM

1 end of the day, but I certainly am not free to act with  
2 sweeping dictatorial powers, I need to follow the law  
3 such as I can figure it out, but go ahead.

4 MS. EICHEL: I would agree, and it's our  
5 position that under 1334(b), this Court does have  
6 "related to" jurisdiction over all cases that are  
7 related to the bankruptcy.

8 THE COURT: Let me interject the following,  
9 and I'm sure I'm getting ahead of your argument, but for  
02:10PM 10 the sake of simplicity, let me think of this in terms of  
11 a state court action against parties not related to  
12 NECC, let's call it a pain clinic, a physician, and the  
13 principal concern, as I understand it, not the only  
14 concern, but the principal concern are contribution or  
15 indemnity claims against NECC, right?

16 MS. EICHEL: Right.

17 THE COURT: And the problem, or one of the  
18 many problems, is the contribution and indemnity claims  
19 come in different flavors, contractual, statutory,  
02:11PM 20 common law and may be asserted at different times. You  
21 can assert them as soon as you're sued, or you can wait  
22 until there's a judgment against you and assert it.

23 But what is the "parade of horrors"?  
24 Suppose I did let things go forward in Roanoke City  
25 Court, let's say that there was a large judgment in the

1 future against pain clinic or physician or both and that  
2 they then sought indemnity or contribution from NECC,  
3 what is the horrible consequence that follows from that?  
4 Suppose that is replicated, you know, in other courts,  
5 other state courts around the country?

6 In other words, presumably as long as it's  
7 still in bankruptcy, those are claims that have to be  
8 made in the bankruptcy court, right, there's an  
9 automatic stay, you can't just file a third-party  
10 complaint I assume at this point against NECC.

02:11PM

11 MS. EICHEL: Right.

12 THE COURT: Wouldn't the bankruptcy court  
13 have jurisdiction over those contribution or indemnity  
14 claims?

15 MS. EICHEL: Well, one moment.

16 THE COURT: Or to put it in another way, and  
17 bluntly -- I'm sure I'm going to say things that reveal  
18 my ignorance -- but let's say you had a \$50 million  
19 judgment against a pain clinic in Roanoke and they make  
20 a claim for indemnity, and the bankruptcy court says  
21 that's very interesting, you know, we're paying out  
22 \$1500 on each indemnity claim, that's all we have, or  
23 you get zero because you're too late, you filed past our  
24 deadline.

02:12PM

25 MS. EICHEL: Right.

1 THE COURT: I just want to make sure I  
2 understand what the consequences are if I don't do what  
3 you're asking me to do.

4 MS. EICHEL: Well, of course, the primary  
5 concern here are remuneration for the plaintiffs, but  
6 what's going to happen is that by its very nature  
7 personal injury claims are -- you can't predict the  
8 outcome of what's going to happen, and it's very likely  
9 that these plaintiffs will get large verdicts against  
02:13PM 10 their healthcare providers and other nondebtors in their  
11 state court cases.

12 THE COURT: All right.

13 MS. EICHEL: While that's going on, while  
14 that litigation is going on, these defendants are going  
15 to be litigating the same issues in many forums all over  
16 the country.

17 THE COURT: There's a discovery issue which  
18 I want to get to, in other words --

19 MS. EICHEL: Sure.

02:13PM 20 THE COURT: -- having multiple competing  
21 demands for discovery, which is important, but I want to  
22 focus now on contribution and indemnity. In other  
23 words, wouldn't the pain clinic have a strong incentive  
24 to try to bring a third-party claim of some sort in the  
25 bankruptcy court or wherever you bring it now, in other

1 words, not to wait, whatever hope they have of  
2 contribution indemnity, they need to assert that claim  
3 now?

4 MS. EICHEL: We expect that they will, for  
5 example, InSight Health Corp. has already asserted in  
6 many different avenues that it intends to bring a claim  
7 against the estate, but where a plaintiff -- what we  
8 have to be concerned with, your Honor, is that these  
9 defendants are going to get out in front of the  
10 plaintiffs.

02:14PM

11 We have a limited estate, as we know.  
12 There's limited resources, and there are multiple  
13 parties already asserting claims or that intend to  
14 assert claims. We know of 180 approximately plaintiffs  
15 that already have filed claims in the MDL, cases in the  
16 MDL, and there are several other claims that we're aware  
17 of to date, but then you have these claims for  
18 contribution indemnification that are potentially in the  
19 millions of dollars, and so what's going to happen is  
20 that these defendants are going to come into the estate  
21 and make claims against it and try to get around the  
22 plaintiffs and interfere with the process, which is to  
23 keep these cases coordinated, to keep them together and  
24 to fairly and equitably treat all creditors of NECC.

02:14PM

25 THE COURT: All right. But at the end of

1 the day, doesn't the bankruptcy court manage that  
2 process? In other words, wouldn't the bankruptcy court,  
3 or for this court, depending on how it plays out --

4 MS. EICHEL: Right.

5 THE COURT: -- be in charge of that process  
6 at the end of the day? In other words, you could come  
7 in with your \$50 million judgment, but you're just  
8 another unsecured creditor, aren't you?

9 Couldn't the bankruptcy court say that's  
02:15PM 10 very interesting, you know, get in line behind everybody  
11 else, and, by the way, the injured plaintiffs come  
12 first? I'm having trouble sorting this out in my mind  
13 exactly how this would work.

14 MS. EICHEL: I think it's difficult trying  
15 to predict what is going to happen. Right now we're  
16 still working, and the trustee is still working on  
17 creating a plan that's fair to all claimants, and so  
18 it's difficult to predict exactly how it's going to  
19 work.

02:16PM 20 What we're most concerned with is that right  
21 now we have 20 or so actions in Virginia that involve  
22 these nondebtor entities. If they have a path, the  
23 plaintiffs have a path to bring state court actions  
24 against those entities, we're going to have cases all  
25 over the country involving those nondebtor healthcare



1 providers.

2 THE COURT: But, again, doesn't it intersect  
3 in two ways with this case? Discovery, in other words,  
4 we don't want the same people deposed 30 times. If  
5 nothing else, to manage the resources of the estate, so  
6 there's a discovery issue there, and there's this  
7 contribution and indemnity issue.

8 Is there another issue? I think your  
9 pleadings referred to the idea that NECC might itself  
02:17PM 10 have indemnity claims anyway against some other  
11 entities. It's not clear to me whether they would have  
12 any against any of these pain clinics or physicians, but  
13 is that the whole universe of how it would intersect  
14 with this proceeding?

15 In other words, suppose I had a way to  
16 manage discovery so we didn't have multiple depositions.

17 MS. EICHEL: Right.

18 THE COURT: Maybe I don't. I don't know,  
19 I'm just thinking out loud, and we have the contribution  
02:17PM 20 indemnity issue. Is there something else I would need  
21 to be concerned about? I mean, at the end of the day,  
22 these pain clinics may not have any source for  
23 contribution indemnity. They may be out of luck, and it  
24 may be unfair to them, but is that my concern?

25 MS. EICHEL: I think every potential

1 creditor is a concern of this Court. While the  
2 plaintiffs that we know of are at the foremost concern  
3 of the MDL, the bankruptcy estate is going to be created  
4 to treat all creditors fairly and equitably, and so  
5 we're asking for more by allowing these cases to proceed  
6 separately, we're going to have more claims for  
7 contribution and indemnification and more entities that  
8 are able to assert claims against the estate, which  
9 would necessarily deplete it.

02:18PM

10 THE COURT: I guess that's what I'm  
11 struggling with. Why would it necessarily deplete it?  
12 Do all these claims have to be made pro rata in the  
13 bankruptcy court? Does the law require that? In other  
14 words, if you have a \$50 million judgment and you're  
15 seeking indemnity or contribution, does that mean you  
16 have 50 times the rights of a \$1 million creditor? Is  
17 that automatic?

02:19PM

18 Could the bankruptcy court say, for example,  
19 you know, we have this limited fund, here's what we're  
20 going to do, every death case gets this much, this kind  
21 of illness gets this much, and whatever is left over,  
22 you know, it's going to get split among, you know,  
23 whatever creditors remain. I thought they had sweeping  
24 powers to manage the estate.

25 MS. EICHEL: Right.

1 THE COURT: And I'm sure I can be wrong on  
2 that, I probably am wrong, but it's just not clear to me  
3 why this mega judgment against a pain clinic in Virginia  
4 necessarily fouls up the bankruptcy plan as opposed to  
5 just being a piece of paper that's like any other piece  
6 of paper where --

7 MS. EICHEL: Right.

8 THE COURT: -- you know, the bankruptcy  
9 court takes it into consideration and in effect says get  
10 in line with everyone else.

11 MS. EICHEL: Sure. Well, you know, at this  
12 point, the trustee has not yet formulated a plan, and  
13 that's obviously the goal, so I think it's really  
14 difficult to predict how exactly this is going to work,  
15 but if your Honor had control over all of these cases,  
16 then the overriding goals of the bankruptcy and  
17 maintaining the estate, the resources of the estate so  
18 that ultimately there's as much money as possible for  
19 the claimants is the best way to avoid letting this  
20 really run amuck because we're going to have all of  
21 these state court actions and all of these potential  
22 claims that are going to be filed against NECC.

23 THE COURT: I want you to get back on track  
24 with your argument, but let me ask another question. Is  
25 there any way that I could control discovery if I do

1 what the plaintiffs' steering committee suggests, which  
2 is to deny these without prejudice and let it play out?  
3 In other words, you know, someone in a case in Roanoke  
4 wants to take the deposition of somebody at NECC or, you  
5 know, demand documents or whatever, do I have the power  
6 in any way to control that?

7 MS. EICHEL: I think that suggestion is  
8 really concerning because if you don't take jurisdiction  
9 over these cases, even if temporarily, we see how it all  
10 plays out, it's creating a road map for all these other  
11 cases to go forward, and the overriding goal is to  
12 centralize. That's what the JPML wanted this Court to  
13 do by creating the MDL to only go through these  
14 discovery issues one time in one court through one  
15 overseer of the entirety of the action.

16 THE COURT: Suppose I took, I swept in  
17 everything, as the trustee suggests, could I sever or  
18 spin things out? In other words, could I issue some  
19 orders to manage the process, for example, let's say I  
20 now have jurisdiction over every case everywhere in the  
21 country and I set some process for filing contribution  
22 indemnity claims, set some procedures for discovery and  
23 then spin it back, sever it and spin it back out, would  
24 that be a sensible solution? I'm thinking out loud. I  
25 have no idea.

1 MS. EICHEL: No, I understand. I think that  
2 there's potential for that. It's not something that's  
3 been briefed, and I think it's something that we'd have  
4 to look into, what the most practical way of doing this  
5 is as long as the overriding goal continues to be that  
6 the litigation is coordinated and that we're not  
7 needlessly conducting discovery in many different fora  
8 over and over again, so, you know, I can't really speak  
9 to what the potential opportunities are for you.

02:23PM

10 I think that you have to exercise  
11 jurisdiction over these cases so it's firmly within your  
12 hands how these cases go forward and so that we can work  
13 with the trustee and all the creditors to effectuate an  
14 equitable plan.

15 THE COURT: All right. I think I  
16 interrupted you about 15 minutes ago. I'm going to let  
17 you get back on track.

02:23PM

18 MS. EICHEL: It's not a problem. I did want  
19 to get into a "related to" jurisdiction analysis, and it  
20 hits on some of what we've discussed. 1334(b), as I  
21 mentioned, gives this Court jurisdiction over all cases  
22 that are related to the bankruptcy, and the trustee  
23 argues that this Court should not stop a transfer of  
24 cases against the debtor, it should extend its  
25 jurisdiction to all cases that impact the estate because

1 of the overriding policy to formulate and conform a  
2 Chapter 11 plan that treats all claimants equitably.

3 We look at it that the number of  
4 contribution claims that will inevitably be filed  
5 certainly if the Gentry, Locke plaintiffs are allowed to  
6 proceed, it's going to lead to a multitude of other  
7 cases filed in state courts against the nondebtor  
8 entities. That would render the whole plan futile.

9 We know that the healthcare providers and  
02:24PM 10 the other nondebtor entities are planning to file claims  
11 for indemnification and contribution. Even if we just  
12 look at the InSight Health Corp. defendant, they've  
13 taken multiple measures to try to assert those claims  
14 against the estate.

15 THE COURT: Am I right that those claims  
16 have to be asserted at this point in the bankruptcy  
17 court, in other words, because they couldn't file a  
18 third-party complaint because of the automatic stay?

19 MS. EICHEL: At this time, what they did was  
02:25PM 20 they -- first they demurred. In Virginia, that's a  
21 motion to dismiss. They also removed the cases  
22 obviously, as you know, under 1452, and then they also  
23 attempted to implead the debtor as a necessary and  
24 indispensable party.

25 In Virginia, those claims are considered

1 ripe, so they could potentially assert a claim in the  
2 bankruptcy, but, again, that's somewhat premature  
3 because the claims process and the deadlines haven't yet  
4 been set, and those details haven't been worked out.

5 What's important when you're thinking about  
6 "related to" jurisdiction is what the Sixth Circuit did  
7 in Dow Corning. There they found that the Court had  
8 "related to" jurisdiction over the unasserted claims for  
9 contribution indemnification because of its impact on  
10 the estate. There, the defendants had used the same  
11 product that were originating with the debtor, and the  
12 Court held that there was a unity of the defendants  
13 there that we would argue exists here.

14 The defense of any claims by these  
15 nondebtors will have to involve NECC. It all leads back  
16 to what NECC did or did not do. They're going to derive  
17 from the same facts. In order to prosecute and defend  
18 those cases, they'll need discovery from the estate, and  
19 what we fear will happen is we're going to have  
20 to -- NECC and the estate is not going to be in your  
21 control, it's going to be in the control of state court  
22 judges around the country.

23 We already know of this coming up in  
24 Virginia, but we're aware of other jurisdictions,  
25 Tennessee, Alabama, Minnesota, Michigan where this same

1 thing is going to happen, and what's happening now is  
2 that the Roanoke plaintiffs are creating somewhat of a  
3 road map for these other plaintiffs to follow.

4 And it really will cause the -- what's  
5 happening in this courtroom to implode because your  
6 control and what the JPML mandate was, which to  
7 coordinate these actions, it's going to be impossible to  
8 do so. It's unimaginable how that would work.

9 I also, your Honor, want to point out that  
02:28PM 10 several of those Roanoke plaintiffs are actually before  
11 this Court because they filed actions in the MDL. They  
12 filed the actions against NECC, and those cases were  
13 transferred to the MDL, and then when NECC filed for  
14 bankruptcy, they brought these actions in state court  
15 against the nondebtor entities, the healthcare providers  
16 and so on.

17 It doesn't seem possible how they can argue  
18 how those two actions which derive from the same  
19 injuries are not related to one another. They are state  
02:29PM 20 court actions that necessarily are going to run into the  
21 issues that we're dealing with here.

22 THE COURT: Let me interject again. How  
23 would this play out? Let's suppose that we had a plan  
24 from the bankruptcy court, it's approved, the matter is  
25 closed. Other litigation against other -- would other



1 litigation, again, like the pain clinic, would that be  
2 spun out? In other words, let's say three years from  
3 now everything is in place but all these actions still  
4 exist. Under the MDL, whatever, I'm supposed to spin  
5 those cases back to their home jurisdictions if there's  
6 anything left to be litigated.

7 If there's a claim against a pain clinic,  
8 wouldn't that go back to Roanoke to be tried against the  
9 pain clinic? If the pain clinic then had a claim for  
02:30PM 10 contribution indemnity, what would happen? Wouldn't it  
11 just be out of luck, again, getting back to my  
12 hypothetical \$50 million verdict? Wouldn't it just be  
13 stuck at that point?

14 MS. EICHEL: First of all, we're not really  
15 just dealing with an MDL in the traditional sense,  
16 there's also a bankruptcy.

17 THE COURT: Right.

18 MS. EICHEL: And for as long as those other  
19 actions are going on and being litigated, the bankruptcy  
02:30PM 20 plan can't be finalized and closed.

21 THE COURT: I guess I'm saying those actions  
22 are going to exist regardless. I mean, a plaintiff in  
23 Roanoke could make the rational decision that I'm more  
24 likely to get more money from the pain clinic and its  
25 insurers than I'm going to get from this quagmire, and I

1 can't take that claim away from them entirely unless the  
2 pain clinic is somehow in bankruptcy in my court, right?

3 MS. EICHEL: Right.

4 THE COURT: I mean, they've got a Seventh  
5 Amendment jury trial right and they have the right to  
6 pursue that claim, so if they don't give up, they may  
7 pursue it eventually. What happens if I take that case,  
8 again, we resolve everything at the bankruptcy as to  
9 NECC and its affiliates, we now have these claims  
10 remaining against pain clinics and physicians and  
11 whatnot, I spin those all back out, they go to judgment,  
12 what happens to their contribution indemnity claims,  
13 they're just out of luck at that point, right, they got  
14 what they got out of the bankruptcy estate if there's a  
15 fund, and that's it, right?

16 MS. EICHEL: I think that that is a possible  
17 scenario, that they would be left without any available  
18 remedies, but I think it's important when we do this  
19 analysis to think about the broader issues at stake  
20 here, which are that these aren't a few health care  
21 providers that are going to have these claims or a few  
22 plaintiffs that are raising these issues, this is really  
23 every single plaintiff in this action, so the bankruptcy  
24 plan really can't be formulated without all of those  
25 actions being brought here and centralized.

1 I would just say that the claims process,  
2 that the claims process basically will crumble because  
3 we'll be waiting to see what's happening with these  
4 claims for contribution and indemnification, and we  
5 won't be able to pay out until we know what is -- who is  
6 try to recover from the estate. We won't have all of  
7 the claimants before us while these other actions are  
8 being litigated.

02:33PM 9 THE COURT: Well, that's, again, what I'm  
10 struggling with. In other words, suppose instead this  
11 court, the bankruptcy court, said, you know, here we set  
12 a deadline, maybe the deadline is in 2015, but there's a  
13 deadline. If you have a claim, you have to file it. If  
14 it's a claim for contribution indemnity, file it. If  
15 you're a pain clinic in Tennessee, you have a pretty  
16 strong incentive, I think, to get that claim on file,  
17 and like any other bankruptcy estate, you know, we have  
18 a deadline, you file your claim, and either you file it  
19 or you don't, and if you don't, then the obligation is  
02:33PM 20 discharged, right?

21 MS. EICHEL: You know, the outcome of what  
22 happens I think is less important than what's happening  
23 while this is all going on because while we can talk  
24 about the claims against the healthcare providers and  
25 the distributors in a vacuum and what those actions will

1 look like, they can't be litigated without considering  
2 NECC, which will lead to discovery.

3 THE COURT: Let's talk about that. And I  
4 may want post-argument briefing on this. Do I have any  
5 way at all to manage that discovery process without  
6 taking jurisdiction over those cases? Do I have any  
7 authority at all to limit and regulate and ride herd  
8 over discovery requests as to NECC and its affiliates  
9 and related individuals unless I have jurisdiction over  
10 those cases? I don't know the answer to that.

02:34PM

11 MS. EICHEL: I don't think that you do. I  
12 don't see how you can control what's happening in a  
13 state court action in Virginia or elsewhere. Those  
14 judges are going to control those cases, and they're not  
15 concerned with the broader mandate that we have here,  
16 which is to: 1, litigate all claims that arise from  
17 injuries related to the injectable steroid; and, 2, to  
18 fairly and equitably to allow these claimants to  
19 recover, to create a plan that's fair and equitable that  
20 counts for everybody.

02:35PM

21 So, you know, I think that might warrant  
22 further briefing, if that's what you ultimately decide,  
23 but I would say that at this point it's better for you  
24 to take jurisdiction and figure out how we can  
25 potentially, if necessary, spin some of these issues off

1     than for you to relinquish jurisdiction, and then it's a  
2     free-for-all.

3             THE COURT: Well, I guess that's exactly the  
4     issue I'm trying to figure out, and I have some natural  
5     caution here to reach out and grab everything. I mean,  
6     at the end of the day, I may do that. It may be the  
7     best of a lot of bad alternatives, but, again, there are  
8     countervailing considerations. I do want to be  
9     respectful to state court processes and not to violate  
10    any of the relevant statutes.

02:36PM

11            If I took control of the state court cases  
12    and issued orders in them and then spun them back out,  
13    it's not clear that those orders would continue to be  
14    valid or that they couldn't be modified by a state  
15    judge, on the other hand, I assume someone from Virginia  
16    can't just take a deposition in a Virginia state action  
17    in Massachusetts, you need to get process, right, you'd  
18    have to go into state court or something. That may be a  
19    hook there. Maybe we could work something out that way  
20    that all state discovery be coordinated through -- I'm  
21    not sure how it would work. I certainly share the  
22    concern about multiple discovery requests. I think that  
23    is a genuine issue that needs to be addressed somehow.

02:37PM

24            MS. EICHEL: If I may, your Honor.

25            THE COURT: Yes.

1 MS. EICHEL: I think it's also important to  
2 think about why these actions were filed in state court,  
3 and it seems clear to me that they were trying to fort  
4 this Court's jurisdiction, to stay out of the  
5 bankruptcy, but the bankruptcy is there to protect all  
6 creditors of the estate, and it's really just an end run  
7 around this Court's jurisdiction and getting out in  
8 front of all these other plaintiffs.

02:38PM 9 If you're going to question whether you have  
10 jurisdiction or whether state court cases, state courts  
11 can deal with these issues independently, I would say  
12 that the only way you can effectively manage it is to  
13 retain jurisdiction over all of these actions, which is  
14 consistent with what the JPML gave you the mandate to  
15 do, and it's consistent with the arsenal of tools that  
16 the bankruptcy code provides.

02:38PM 17 THE COURT: So getting back to you say I  
18 have an obligation or the bankruptcy court has the  
19 obligation to protect the creditors. In this case, you  
20 would include the pain clinics or the physicians as  
21 creditors in that analysis, is that the idea? In other  
22 words, if they are contribution and indemnity creditors,  
23 they're creditors, nonetheless? Does it make a  
24 difference whether they are potential claimants as  
25 opposed to actual claimants? Does that make any

1 difference in this context?

2 MS. EICHEL: They're potential, but we know  
3 that they exist and that they're going to be asserted,  
4 so there's really no difference between those.

5 Do we -- I think you're asking if we really  
6 are concerned with whether at the end of the day those  
7 pain clinics pay out to these plaintiffs and are not  
8 able to recover? You know what, and it's a good  
9 question, I just -- I don't think that we can really

02:39PM

10 begin to figure it out because it's -- there's just too  
11 much at stake. There's too many cases, too many  
12 plaintiffs that are going to bring these claims.

13 There's too many other parties that are going to be  
14 subject to other court's jurisdiction, and they're going  
15 to be out of pocket potentially rightfully, potentially  
16 they do have or should have an opportunity to recover as  
17 well.

18 I think in answer to your question, the  
19 foremost concern of I would think everybody here are the  
20 injured parties.

02:40PM

21 THE COURT: I agree with that. All right.  
22 Go on. At the end of the day, you may be right. I may  
23 agree with you. I'm struggling with that, obviously.  
24 Maybe this means I don't have the right Federal Judge  
25 attitude, that I'm pausing before taking over every

1 single problem, state and federal, in the United States.  
2 Maybe the full weight of the robe hasn't fallen on my  
3 shoulders yet, but I do think I need to pause and think  
4 this through.

5           There are lots of countervailing  
6 considerations, and I want to make sure I'm not doing  
7 more harm than good if I go down this path, that this is  
8 sensible, and I'm being fair to everyone. Obviously  
9 injured parties are an important part of it, but they're  
10 not the only part of it.

02:41PM

11           MS. EICHEL: Well, you know, I'll leave you  
12 then with a thought about centralization.  
13 Centralization of this litigation is critical for the  
14 efficient and expeditious resolution of this case, and  
15 the trustee's making every effort to efficiently and  
16 fairly compensate the creditors, and from that  
17 perspective, the only chance at any kind of global  
18 resolution is to use the powers afforded to you by  
19 Congress, by the JPML and to transfer all these cases to  
20 this court.

02:42PM

21           THE COURT: All right. Thank you. I think  
22 what I'd like to do next is hear from the steering  
23 committee and then maybe from -- Mr. Sexton, are you  
24 going to take the lead on the Roanoke piece of this? Is  
25 that the plan?



1 MR. SEXTON: Yes, your Honor.

2 MR. MOLTON: Your Honor, David Molton for  
3 the creditors' committee.

4 THE COURT: Yes.

5 MR. MOLTON: I was just thinking because we  
6 joined in the motion that we'd maybe go next, and maybe  
7 I could answer some of your questions.

8 THE COURT: Ms. Parker, do you have a  
9 problem with that?

02:42PM 10 MS. PARKER: No, your Honor.

11 THE COURT: Go ahead.

12 MR. MOLTON: Judge, David Molton for the  
13 statutory creditors' committee, and I'm glad I brought  
14 my bankruptcy code with me. In any event --

15 THE COURT: Are you going to read from it?

16 MR. MOLTON: No, Judge.

17 THE COURT: I have a tape of the hockey  
18 game.

19 MR. MOLTON: I was glad I had it because a  
02:43PM 20 number of your questions caused me to open the book. I  
21 think I can, first of all, answer a few of your  
22 questions by reference to the bankruptcy and the  
23 bankruptcy code. First of all, the creditors'  
24 committee, as you know, is a statutory committee  
25 invested with power to represent all the creditors, and

1 that includes at this point not only the plaintiffs in  
2 this MDL but also all the infected folks, 700 plus,  
3 possibly the 13,000 who received the tainted MPA  
4 steroid, and one of the things we don't want to do, and  
5 the trustee joins me on this, is create new creditors  
6 for us to represent, which would be indemnity and  
7 contribution creditors, so we're supporting the  
8 trustee's motion, and that motion has to be read in  
9 context, your Honor, with the trustee's stated goal,  
10 which he's told you a number of times, which is what he  
11 wants to do is bring everybody here together in front of  
12 your Honor and devise a plan using the bankruptcy tools  
13 to get all parties, all potentially liable parties,  
14 whether it be through a mediation process, through  
15 discussions, whatever, to contribute to a pot in the  
16 bankruptcy, for which those people, including the pain  
17 clinics in the states, would release their indemnity  
18 claims and contribution claims against the estate in  
19 return for plan releases.

02:44PM 20 That's why they are incented to come here  
21 and deal with the trustee in accordance with his global  
22 plan, and he believes and we believe that getting  
23 everybody here is a significant step in that direction.

24 I know your Honor read all the papers. I  
25 know the trustee cited many times the Twin Labs case and

1 the Metabolife case. That's what happened there.

2 THE COURT: We do have cases pointing in the  
3 other direction, the Third Circuit.

4 MR. MOLTON: And I'm going to get to that,  
5 I'm just going to add some things. But the "parade of  
6 horrors," your Honor, that you asked about is simply  
7 this: Is there plaintiffs in jurisdictions or with  
8 defendants, all of who have claims against the debtor,  
9 they have asserted or may have potential claims against  
10 various non-debtors, some of them may have a lot of  
11 money, some of them may not have a lot of money. Some  
12 of them may have big policies, others of them may have  
13 no policies.

14 In any event, what I think my friend from  
15 Harris, Beach was trying to say is that if there is a  
16 major judgment against one of these state third parties,  
17 that party then has a liquidated claim for indemnity and  
18 contribution, forget about whether they'll be an  
19 objection, whether it should be allowed or not, that's  
20 separate litigation, but that claim is filed in the  
21 bankruptcy, and they rank *pari passu* with the victims.  
22 They're all unsecured creditors, there's no priority,  
23 and I think that answers one of your questions, your  
24 Honor.

25 THE COURT: And it has to be that way?

1 MR. MOLTON: It has to be that way pursuant  
2 to the code, and I'd refer you to 502 of the code,  
3 Section 502 of the code.

4 Now, the bottom line is that any time from  
5 here, there's 362, Section 362 of the bankruptcy stay,  
6 so none of these third parties can crossclaim for  
7 indemnification unless they get a vacator of that stay  
8 by the bankruptcy judge, or they can't file an  
9 independent suit, but what they can do, even now, and  
02:46PM 10 they will do the bar date, and there's going to be a bar  
11 date at some period of time in the bankruptcy, they will  
12 have to file at that point a contingent indemnification  
13 and contribution claim in the bankruptcy. That is a  
14 valid claim.

15 Section 101 of the bankruptcy code defines  
16 claim to include "all contingent claims." That claim  
17 then ranks on the same level with the contingent claims  
18 of the victims, and that's what the trustee is trying to  
19 avoid, and you're right, your Honor, at the end of the  
02:47PM 20 day, if there's a plan confirmed and those claims are  
21 still contingent, they're disallowed, right, so that was  
22 one of your questions, what happens at the end of the  
23 day when if these claims aren't -- and remind me about  
24 attorneys' fees because that's a different issue --

25 THE COURT: I'm sure none of us care about

1 attorneys' fees.

2 MR. MOLTON: -- and then liability. I'm  
3 talking about defense costs, but the code provides for  
4 that, and, you know what, these third parties who have  
5 contingent indemnification or contribution claims in the  
6 bankruptcy aided by capable bankruptcy counsel aren't  
7 going to sit and wait until a plan is confirmed.

8 First of all, they're going to be part of  
9 that plan process, they're going to scream and yell and  
02:48PM 10 fight to assert themselves, and there's a provision in  
11 the code called 502(c), yes, 502(c) of the bankruptcy  
12 code.

13 What that code does is says they can make a  
14 motion, the trustee can make a motion, the creditors'  
15 committee can make a motion to estimate those claims for  
16 the purpose of the plan, and what that will do, they'll  
17 be a lot of litigation over that, they'll be a mini  
18 trial, mini trial, maybe a maxi trial over that, all of  
19 which is going to deplete the estate.

02:48PM 20 But the bottom line is these people aren't  
21 helpless, these people who hold these claims aren't  
22 helpless to wait till the end of the day, and if they  
23 haven't liquidated their claim, they're out, no, they  
24 get a right to try and have those claims estimated in  
25 the bankruptcy, and that's going to be more costs, so

1 what we're trying to do, the committee with the trustee  
2 and the PSC, looking at a vision, and there may be  
3 differences of approach at times, but what we'd like to  
4 do is eliminate as much as possible giving me more  
5 people to represent.

6 Okay. So the way to do that, and the way  
7 it's been done all across the nation, as your Honor has  
8 read in the cases, is by having a consolidated  
9 proceeding supervised in coordination with the  
02:49PM 10 bankruptcy court, and we believe that the "parade of  
11 horrors" is that that poor plaintiff in Michigan, in  
12 Virginia, even Virginia, my friend, Mr. Sexton, is going  
13 to disagree with me, who doesn't have a big pocket is  
14 going to have to then compete with the big pockets that  
15 other more fortunate victims were able to collect  
16 against, and that pot in the bankruptcy, if this is let  
17 to go unbridled is just going to be -- it's going to be  
18 a finite pot.

19 Hopefully we're going to enlarge it for the  
02:50PM 20 benefit of everybody, but you're going to have that poor  
21 plaintiff who doesn't have the wealthy, big pocket  
22 defendants is going to have his or her victims' claim  
23 diminish *pari passu* by these big judgments or these  
24 estimated claims, and in that way, if I can add to my  
25 friend from Harris, Beach, that's the inequity that the

1 trustee is trying to prevent, that's the inequity is  
2 that we're trying to treat all these plaintiffs alike  
3 and get them paid out *pari passu* for the benefit of --  
4 you know, to pay them, compensate for their injuries and  
5 keep out competing claims by people who we don't need  
6 competing against them.

7 Your consolidating these claims, your Honor,  
8 and taking jurisdiction over them -- and I'm going to  
9 get to that in a minute -- would significantly  
10 facilitate that process.

02:50PM

11 Your Honor also asked about discovery.  
12 Assuming I want to retain jurisdiction, and, you know, I  
13 want to supervise discovery, well, I think the trustee  
14 in last night's papers gave you one way of doing that,  
15 the All Writs Act, and I know that that was raised last  
16 night.

17 Also, your Honor, in bankruptcy courts all  
18 over the country, to the extent it becomes an issue,  
19 there may also be other remedies to deal with that  
20 through the injunction of Section 105 of the bankruptcy  
21 code, but that's not here and now.

02:51PM

22 THE COURT: I hope you appreciate my  
23 hesitation in either, you know, acting under the All  
24 Writs Act or enjoining a state court proceeding. I  
25 mean, we're at the outer limits of judicial authority

1 under any circumstances.

2 MR. MOLTON: Judge, I agree with you, and,  
3 you know what, I don't think you need to do that. I  
4 think 157(b)(5) gives you the authority to bring these  
5 cases here. That brings me -- and I'm going to finish  
6 up because I know there's a lot of other people here,  
7 and I hope I touched -- was able to answer, to help my  
8 friends, to add to my friend's answers to your Honor  
9 with some more specific references to how things work in  
10 the bankruptcy.

02:52PM

11 Judge, one of the things that I intended to  
12 get up here today, not talking about the bankruptcy code  
13 itself, but I intended just to talk about "related to"  
14 jurisdiction, and I know it's been briefed, and I'm not  
15 going to go over those.

16 I think the trustee did a magnificent job of  
17 describing the state of the law of it, but what I did  
18 over the last day or so is I had the occasion, there  
19 were three District of Massachusetts cases, one  
20 bankruptcy appellate panel, two magistrate judge  
21 opinions that were adopted by the District Court, and  
22 when you read them closely, I mean really drill down on  
23 them, they actually support the Sixth Circuit.

02:52PM

24 They don't contradict, and they don't reject  
25 the Sixth Circuit approach, and this goes to what you



1 mentioned earlier to me about the Pacor case in the  
2 Third Circuit against now Corning, and I know the Second  
3 Circuit, from where I come from, is pretty well in line  
4 with Dow Corning.

5 But I just want to quickly go through these  
6 these cases, then I'm going to get off this rostrum,  
7 your Honor. The Cambridge Place Investment Management  
8 case dealt with an indemnity agreement. It was adopted  
9 by Judge Gordon, 813 F. Supp. 2d 242.

02:53PM

10 What I would do is, you know, there's a lot  
11 of discussion at the beginning about the various  
12 positions of the parties and the various states of law.  
13 I know my friends from the PSC cited some of that in  
14 their papers, but I'd refer you to the Westlaw pages 20  
15 to 21 where the Court goes through First Circuit law and  
16 says the First Circuit has recognized that "related to"  
17 jurisdiction is to be construed fairly broadly and  
18 encompasses proceedings which potentially -- and that's  
19 the significant difference from Pacor, I think -- have

02:53PM

20 the effect on the bankruptcy case such as altering  
21 debtor's rights, liabilities, options and freedom of  
22 action, or otherwise having the impact upon the handling  
23 and administration of the estate, citing Middlesex Power  
24 Equipment, 292 F.3d. 61, First Circuit, 2002.

25 The Court then went on to say that clearly a

1 finding of liability pursuant to that potential  
2 agreement would effect the estate. Accordingly, it had  
3 "related to" jurisdiction. It remanded the case on  
4 abstention grounds, and I'm not going to deal with  
5 whether that was right or wrong. I'm not even going to  
6 deal with that. Those were raised in the papers, and  
7 I'm going to leave my friend, Sexton, Mr. Sexton, to  
8 argue for that and leave the trustee to his papers on  
9 that.

02:54PM

10 Then it went on in the next paragraph to  
11 say, even if the Pacor rule was adopted, we'd have it  
12 here, anyways. So just from that case, that  
13 First Circuit District Court case, I think from a close  
14 reading supports the broader view.

02:55PM

15 I'd also refer your case to the  
16 Haber v. Massey case. I think that this is actually  
17 more on point. It was adopted by Judge Ponsor, 2012,  
18 Westlaw, 5398567, and, again, I think it's the same page  
19 numbers, Westlaw at page 20 to 21, and this case, your  
20 Honor, concerned an auto accident, I believe, but it's a  
21 tort case where the driver of a truck was in Chapter 7  
22 bankruptcy, an individual liquidation, and the case  
23 against him was stayed pursuant to 362 of the code, and  
24 the plaintiff went after the truck owner who had  
25 vicarious liability, right, you know, alleged vicarious

1 liability, which isn't an automatic indemnification, so  
2 to say, I mean, pursuant to Pacor, other things had to  
3 be proved in order to prove that case.

4 The Court basically adopted from my reading,  
5 and other people may beg to differ, but I think it's  
6 pretty clear, the Sixth Circuit rule, and the Court said  
7 on pages Westlaw star 20 to 21, "The Court concludes  
8 that "related to" jurisdiction over a plaintiff's state  
9 law claims is present here."

02:56PM

10 First, courts have explicitly found that  
11 tort actions are related to a debtor's bankruptcy  
12 proceeding because any disposition of issues in a tort  
13 case will be related to the determination of a debtor's  
14 liability and would also bear upon any resultant  
15 contribution owed, and there it was saying two things  
16 because in that case, the liability was linked, the same  
17 core facts as we have here. Everything, as the  
18 trustee's motion says, goes back, goes back to NECP, and  
19 those facts that come from there.

02:56PM

20 Then it talked about resulting contribution  
21 owed, not automatic indemnity, and it cited to  
22 NUTRIQUEST, which is a District of New Jersey case that  
23 was part of the Ephedra bankruptcies, of which Twin and  
24 Metabolife were part of.

25 The Court then there, I believe, also on

1 abstention grounds sent it back, but those cases that  
2 dealt with abstention, I'm just going to deal with it  
3 for one second, Judge, didn't deal with a mass tort, and  
4 it's arguably whether this is comparable to mass tort  
5 with thousands of cases, but we've got hundreds of cases  
6 and potentially a thousand plus cases, and so the issues  
7 there are different in terms of abstention from the  
8 issues here, and they've been briefed at length.

9 But I would refer your Honor to that case,  
02:57PM 10 which is on page -- I'm trying to find it -- 28 where  
11 the Court says, "As one Court has observed, the question  
12 of abstention boils down to whether in the balance  
13 justice is better served by the bankruptcy court or  
14 another court deciding the matter. At the heart of the  
15 matter is what is in the best interests of the estate."

16 And it's my submission to your Honor today  
17 that the trustee has made a compelling case that the  
18 best interests of the estate here is served by your  
19 taking jurisdiction of these cases for the reasons set  
02:58PM 20 forth in the trustee's motions.

21 Lastly, then I'm going to sit down, the  
22 Santa Clara case, that's an older BAP case, bankruptcy  
23 appellate panel from the First Circuit. It dealt with a  
24 guarantee, and that case is a little more opaque, and I  
25 had to read it about three times before I decided what

1 it meant, and folks may differ, but it dealt with a  
2 declaratory judgment, and also what it dealt with, your  
3 Honor, is whether that declaratory judgment invested one  
4 party nondebtor with a right to recover from another  
5 party nondebtor, who had the principal liability from  
6 the debtor, and what I read the Court as saying, first,  
7 it's a declaratory judgment.

8 Second, all that happened here was the  
9 shifting of liability, meaning it didn't create a new  
10 claim, it just shifted the liability from one creditor  
11 to another.

12 I think that's not the case here for the  
13 reasons stated in the trustees' motion. Indeed, getting  
14 back to the thing I put on the side, Judge, defense  
15 costs. Any progress of the state court actions is going  
16 to create defense costs on the part of the defendants  
17 that arguably, potentially, conceivably, to use the  
18 Pacor general principle standard, not getting into the  
19 third-party part of Pacor would have an effect on the  
20 estate.

21 So it's our contention, your Honor, that,  
22 you know, there's not just liability shifting here,  
23 there's more than that. Any progression of state court  
24 litigation, again, increases my constituency, and our  
25 goal from the get-go is to make sure that that doesn't

1 increase and that the funds that are available and may  
2 be aggregated through the trustees, the PSCs and the  
3 committee's good efforts are utilized to pay victims,  
4 and that's my presentation. I hope that was helpful,  
5 Judge.

6 THE COURT: All right. Thank you. All  
7 right. Mr. Sexton, why don't I hear from you next. You  
8 can identify yourself for the record.

9 MR. SEXTON: Thank you, your Honor.

03:00PM 10 Scott Sexton from Roanoke, Virginia. Where I come from,  
11 *pari passu*, I think, is an Italian dessert we get at the  
12 Olive Garden.

13 MR. SOBOL: Come on, your Honor, that was a  
14 good one.

15 THE COURT: I hope you brought your winter  
16 coat. It was in the 30's last night.

17 MR. SEXTON: I don't have my bankruptcy code  
18 either, so Mr. Molton has me up on that.

19 I would like to address a couple of your  
03:01PM 20 questions, if I could. That seems like a good way to  
21 start. One of your most practical questions, at least  
22 it seemed to me, was the issue of how do you control  
23 discovery, and, particularly, I guess, the only  
24 discovery we're worried about here at all would be  
25 discovery of New England Compounding Pharmacy.

1           That's got to be the only discovery that  
2       would be at the attention of this Court, and I would  
3       have to say, it is at the absolute bottom of my  
4       attention list because we just don't see much there  
5       worthy of discovery or needing discovery.

6           THE COURT: But surely the defendant in your  
7       case, or the defendants, I mean, I don't know much about  
8       the case, obviously, but I can certainly guess that  
9       they're going to say we bought this product, we had no  
10      idea it was contaminated, we administered it, it's their  
11      fault, not ours, and maybe under Virginia law, they're  
12      on the hook, but they're going to say, well, this isn't  
13      fair, we need the claim against them, and at a minimum,  
14      we need discovery from them.

15          MR. SEXTON: Right. I'm sure there is some  
16      discovery that we'll be asked for in that case. First  
17      off, it's very important to understand Virginia does not  
18      have comparative fault, so in this case I don't know  
19      what Massachusetts has, but let's say New England  
20      Compounding was 90 percent at fault and say InSight  
21      Imaging was only 10 percent at fault, it's a joint and  
22      several verdict, and there is no apportionment for  
23      purposes of contribution.

24          It's pro rata, not proportionate, so you do  
25      not even have a claim as one joint feisor for

1 contribution until after you have paid more than your  
2 fair share, which if there are two defendants means more  
3 than half.

4           So, yes, Harris, Beach made an issue of the  
5 fact that you can assert a cause of action for  
6 contribution only by third-party claim, only with the  
7 permission of the Court at this time, the automatic time  
8 period having expired, and so there is no right claim  
9 for contribution in Virginia, it's all at the discretion  
10 of the Court, and it is, as you pointed out, impossible  
11 because New England Compounding Pharmacy is in  
12 bankruptcy, which makes them not subject to service of  
13 process, which makes them absolutely impossible to be a  
14 necessary party in Virginia.

03:03PM

15           I will correct counsel as well. There has  
16 not been a motion to implead them as a third party.  
17 There has been a motion to dismiss, as she noted, a  
18 demur in Virginia alleging that the plaintiff had failed  
19 to state a cause of action against InSight for failing  
20 to add New England as a party, so that there has not yet  
21 been a motion.

03:03PM

22           There was a motion for leave for additional  
23 time to file a third-party complaint, which was not  
24 granted so that was -- that's as close as they have come  
25 to moving to implead.



1                   Now, so there's discovery. I mean, in  
2                   reality, the discovery of whom, the New England  
3                   executives, the New England people who are on the hook.  
4                   As we pointed out in our filings, those will be the  
5                   shortest depositions. They should last about as long as  
6                   the congressional hearings did, which is long enough for  
7                   the plaintiff to say are you really going to plead the  
8                   Fifth to every substantive question, and so I won't be  
9                   coming up here to take depositions of the New England  
03:04PM 10                  executives, but certainly somebody might, and I'm sure  
11                  they'll tell us what they say when they do that, and if  
12                  the defendant in our cases wants to take their  
13                  deposition, they will have to go through you.

14                   You raised a practical question. I think  
15                   there was some reference to the fact that just the gates  
16                   would open and people would be barreling up here to get  
17                   New England's documents. I'm a little confused by that  
18                   myself because I saw on the TV that the Federal  
19                   Government was taking out all those documents at some  
03:05PM 20                  point, but I assume New England still has some documents  
21                  that may be relevant and some other evidence that may be  
22                  relevant.

23                   THE COURT: Well, you know, I haven't yet  
24                   been called upon to address the issue of how, you know,  
25                   criminal investigations is going to interact with civil

1 discovery, but at some point civil litigants are going  
2 to get access to these documents if they want them. The  
3 government isn't going to keep them hidden from view  
4 forever, at a minimum.

5 MR. SEXTON: Here's a practical, if the  
6 "parade of horrors" was that there would be just  
7 hordes of plaintiffs' lawyers wanting to take  
8 depositions and look at the same document, you have  
9 authority over the bankruptcy court that is  
10 administering the estate of New England Compounding.

03:05PM

11 It seems to me as simple as you withdrawing  
12 the reference as to issues relating to discovery of  
13 New England Compounding lifting the stay as to issues  
14 related to their insiders, their close associates, and  
15 then you would be in direct charge of that, and I assure  
16 you, no state court in Virginia is going to tell a  
17 District Court sitting in bankruptcy when and how that  
18 court's debtor is going to be deposed or is going to  
19 produce documents.

03:06PM

20 I don't see any other way than to go through  
21 you, and, honestly, I've never assumed there would be a  
22 way to go other than through this Court. I think  
23 there's also this point that the MDL has a state court  
24 liaison.

25 I mean, what's the point of having a court

1 state liaison if you don't have any state court actions?  
2 I had assumed that that person was somebody who would  
3 actually help us coordinate with the plaintiffs'  
4 steering committee, we submit to them, these are  
5 documents that we'd like to have, can you help us get  
6 them. I can tell you the plaintiffs' steering committee  
7 has asked me what types of documents to ask for with  
8 regard to certain issues.

03:07PM 9 So, I, again, do not see that as a big  
10 problem at all, and I see it something well within your  
11 power to control should you choose to do so, and I  
12 believe you should choose to do so.

13 So that was the one main reason was that  
14 there would be problems with discovery, and I believe  
15 that's what the trustee's counsel cited as the big  
16 concern for this free-for-all.

03:07PM 17 We just simply don't see the reality of  
18 that, and I think Mr. Molton made a much, much, much  
19 more cogent argument that I actually understood for the  
20 very first time because I think it's actually been said  
21 for the very first time, which he said the whole goal is  
22 to prevent there from being any other contribution  
23 claims, and the only way you do that is by preventing  
24 the plaintiffs from actually succeeding in any of their  
25 cases, and so he has a worthy goal. His goal is not to

1 have any more clientele, which means there are no more  
2 creditors.

3 That's a worthy goal, and it's an  
4 understandable goal, and I get it that if you thwart the  
5 Virginia cases, then that does have that effect. It  
6 does sort of conflict, however, with our American system  
7 of justice in that's the problem because it is a totally  
8 logical argument to say if you stop these plaintiffs  
9 from getting the judgments they're entitled to against  
03:08PM 10 nondebtor defendants, then you will in fact stop  
11 contribution claims, and I think for the poor plaintiff  
12 who does not have the big defendant who will then have  
13 his claim decreased by a large contribution claim also  
14 made against the estate.

15 The only problem is that this Court does not  
16 have the authority to prevent claimants who have  
17 interacted, contracted with third-party defendants from  
18 pursuing their goals of achieving justice in those cases  
19 and against those defendants, and if that in fact gives  
03:09PM 20 rise to a contribution claim, then that is something  
21 that just comes naturally from that process, but it's  
22 simply not part of our system to prevent those parties  
23 from pursuing their rights so as to prevent the  
24 aftermath of that pursuit.

25 I can tell you in Virginia, a contribution

1 claim, like I said, at most would be half of the  
2 judgment, and I believe it would just simply be asserted  
3 as a contingency just like our client's claims will be  
4 asserted as contingency claims.

5 THE COURT: But if Mr. Molton is right, I  
6 mean, let's say that some plaintiff gets a big hit, gets  
7 a billion dollar judgment or something, I don't know,  
8 even a contribution claim for half that, when it gets  
9 presented as a liquidated claim in the bankruptcy court,  
03:10PM 10 they take all the food at the Olive Garden, right, I  
11 mean, they get everything.

12 MR. SEXTON: In Virginia, I can only speak  
13 as to Virginia law, in Virginia that plaintiff who you  
14 just described would have to first pay \$500 million plus  
15 one dollars before they would have a claim against  
16 New England Compounding. The likelihood of that is slim  
17 to none, and I think slim just left town, but you just  
18 don't have the claim until you pay more than half of the  
19 judgment.

03:10PM 20 So it is possible, but, there again, a  
21 worthy goal, Judge, but it has never been the policy of  
22 American justice to prevent plaintiffs from pursuing  
23 their rights of a jury trial just to avoid the  
24 consequence of a contribution claim.

25 THE COURT: What about indemnification?

1 Again, obviously, I don't know anything about Virginia  
2 law, but isn't there a common law right of  
3 indemnification if you're found liable based on someone  
4 else's fault, you know, like the liability, the claim  
5 that a principal would have against an agent who caused  
6 the principal to file?

03:11PM 7 MR. SEXTON: There is a common law indemnity  
8 associated with products liability in Virginia. There  
9 is no statutory indemnity, and it depends upon the clean  
10 hands of the parties seeking the indemnity, and in this  
11 case, based upon the facts and allegations we've  
12 discovered, there are no clean hands to be found, and so  
13 we do not believe there will be an indemnity claim.

14 I think we probably said that in our brief,  
15 but you have to have clean hands, you have to have --  
16 don't have independent fault, and your liability has to  
17 be derivative of the primary defendants such that you  
18 can imagine a retailer, like Wal-Mart, selling a lawn  
19 mower. All Wal-Mart does is put it on the shelf.

03:11PM 20 THE COURT: Or pharmaceutical, as happens  
21 all the time.

22 MR. SEXTON: In pharmaceuticals, they put it  
23 on the shelf. In this case, it's different. There's a  
24 primary service that intervenes, you have  
25 representations made by that primary service provider,

1 you have medicals negligence, Consumer Protection Act in  
2 Virginia, Virginia fraud, and so there are any number of  
3 cases, I mean, factors in this case which make it almost  
4 inconceivable that New England would have an indemnity  
5 claim brought after it successfully by the debtor here,  
6 the nondebtor party.

7 So I think that is not to be -- that really  
8 shouldn't drive it, and it seems to me this idea that  
9 you -- the trustee's counsel also said that you could  
10 never do a plan until you had some type of knowledge of  
11 all these contribution claims, but it seems to me that  
12 there's one thing that we know for sure. New England  
13 Compounding did not sell these products directly to any  
14 consumer.

15 There is no patient out there who injected  
16 themselves with this product, and so if you simply  
17 assume that every claim that's made against a debtor,  
18 there is somebody who has a contribution claim  
19 associated with that claim.

20 That to me defines the universe of the  
21 contribution claims, and if I were representing any  
22 healthcare provider who handled any of these things,  
23 regardless of whether I had been sued or not, I would  
24 definitely file a notice of claim for contribution,  
25 unliquidated, because I know I have that exposure.

1           So I think those are not -- those are not  
2     issues that really are going to change based upon  
3     whether we're going forward in Virginia or not.

4           I do believe that the trustee has expressed  
5     in some respects the kind of -- I think contribution is  
6     a rationale here. I think the real reason is expressed  
7     roughly on the second page of the brief that was filed  
8     on May 2d where the trustee goes into the fact what they  
9     are really looking for is contributions from these  
10    third-party defendants.

11           It's not the contribution claim from these  
12    third-party defendants, it's the amount of money that  
13    these third-party defendants can contribute to the  
14    trustee's plan that is what's really at issue, and so  
15    they've laid it out fairly bluntly.

16           I think the point is to get the third-party  
17    defendants before your Court, attempt to engage in a  
18    mediation, hold a carrot out for the defendants that  
19    they will stay discovery so long as they participate and  
20    participate meaningfully and then offer that nondebtor  
21    defendant a nondebtor discharge somehow, which I think  
22    is dubious in its own right.

23           So that's the reason these debtors are  
24    wanted here is not because of the contribution claims  
25    they're going to assert but the funds they potentially



1 bring to a pool that would then be part of the trustee's  
2 plan.

3 By the way, that doesn't take away or  
4 detract anything from the trustee, it doesn't take away  
5 or detract anything from the debtor because they are all  
6 third-party funds coming into that pool that would be  
7 part of the pool, so that, I believe, is fairly squarely  
8 addressed in the trustee's filings and certainly in the  
9 some of the comments that have been made to you today.

03:15PM

10 Your Honor, I have a practical question that  
11 has never been raised, and I'm not posing it to the  
12 Court but just posing it for the Court. A practical  
13 question that has not yet been addressed in any of these  
14 filings, when the trustee filed his original transfer  
15 motion, it had a draft order attached to it that  
16 appeared like it would just go out to all state courts  
17 saying transfer your case up to Boston District Court,  
18 and I have looked, with no success, in trying to find  
19 any kind of procedural justification for that, and so it  
20 is very unclear to us folks in Virginia as to how that  
21 leap would be made from a state court to this court  
22 unless you --

03:16PM

23 THE COURT: I'm assuming I have to issue an  
24 injunction which triggers issues under the  
25 Anti-Injunction Act and a host of other type issues, but

1 I don't think I just send something in the mail to the  
2 Davidson County, Tennessee court, and, by the way,  
3 transfer your case to me. I don't think it quite works  
4 that way.

5 MR. SEXTON: It is a matter that we have  
6 rather scratched our heads about as to how that would  
7 happen, and I would assume it would mean that the cases  
8 would have to go through the Federal Court in Roanoke,  
9 which, of course, they just attempted that.

03:17PM

10 THE COURT: That's a good point. I can't  
11 say that I've thought that through completely myself.

12 MR. SEXTON: Speaking of the Federal Court  
13 in Roanoke, your Honor, after the trustee filed his  
14 transfer motion in this action, a number of weeks  
15 passed, then the defendant, InSight, in that case, in  
16 those cases removed them to Federal Court.

03:17PM

17 As you know, Judge Wilson just issued an  
18 opinion on that last Friday. Those were 17 cases which  
19 I think is more than a handful, and 14 were remanded on  
20 three alternate grounds, one of them including  
21 untimeliness, and three were remanded on two alternate  
22 grounds, not including untimeliness, and, of course, the  
23 Court addressed abstention and permissive and/or  
24 equitable abstention in all of those cases, and I just  
25 wanted to address the statistics as to how many of those

03:18PM

4 MR. SEXTON: Your Honor, I would be happy to  
5 address any questions that you have. I know you've said  
6 you read our pleadings. I think I've addressed the  
7 questions you asked of the trustee's counsel, so I think  
8 we've addressed the "parade of horrors." I don't  
9 think there will be a "parade of horrors."

03:19PM

25 MS. PARKER: So the plaintiffs' steering

1 committee largely supports the trustees' motion, but we  
2 have advocated that the District Court carve out, that  
3 is, not decide whether to exercise "related to"  
4 jurisdiction over narrow sets of cases, specifically  
5 state court cases against only defendants who are  
6 unaffiliated with NECP where the only claim of "related  
7 to" jurisdiction is based on a potential, but  
8 unasserted, claim of contribution or indemnity.

03:19PM 9 I wanted to address for the Court briefly  
10 why the plaintiffs' steering committee cares about this  
11 motion. It might be understandable for one to think,  
12 well, you're the lawyers running the show in Federal  
13 Court up there in Boston, you would want all of these  
14 cases to come there, and, admittedly, it would  
15 undoubtedly be more efficient if all of these cases, at  
16 all touching on anything related to NECP, came to  
17 Boston, but federal courts are courts of limited  
18 jurisdiction.

03:20PM 19 With that in mind, we have three reasons  
20 that we're concerned here: First, we've read the case  
21 law. Our reading of the case law, and, admittedly, I  
22 think reasonable minds disagree on this -- they  
23 certainly have today -- this Court does not have  
24 "related to" jurisdiction over cases against nondebtor  
25 defendants in state courts where the only issue, where

1 the only allegation of "related to" jurisdiction or  
2 potential indemnity and contribution claims.

3 I won't rehash the case law here, we've set  
4 it out in our brief, but I will say from the PSC's  
5 perspective, if one is being academically honest about  
6 the state of affairs, it is at a minimum an open  
7 question and one that need not be decided today.

8 The second concerned and ties in with the  
9 first. The PSC has every interest in protecting the  
03:20PM 10 finality of the settlement or plan here, and along those  
11 lines, we're interested in avoiding appeals and  
12 potential appeals.

13 We would not want a situation where an  
14 appellate court reviews the decision from this Court and  
15 reverses because it determines that this Court  
16 overreached slightly in asserting "related to"  
17 jurisdiction and have a situation where that would  
18 effect what is otherwise a final plan or settlement.

19 Thirdly, as I think the dialogue today has  
03:21PM 20 fleshed out, there are other tools available here to  
21 coordinate and address both indemnity and contribution  
22 claims and to control discovery.

23 So I'll focus on discovery first since your  
24 Honor seemed to be interested in that in particular.  
25 I'll observe that federal and state court judges

1 regularly coordinate discovery in mass tort proceedings.  
2 It is not uncommon that they do so.

3 THE COURT: Well, I'm certainly familiar  
4 with one federal judge coordinating with one state court  
5 judge in the same jurisdiction. It's not so clear to me  
6 that I can coordinate with 38 state judges in 38  
7 different, I mean, I'm pulling that number out of the  
8 air, it could be 178 different judges, or whether I can  
9 even keep track of it.

03:22PM 10 One of my fears is that I'll find, you know,  
11 that the case in Minneapolis that I've deferred a  
12 decision on is in its second week of trial and that  
13 events have far exceeded my ability to coordinate  
14 things.

15 MS. PARKER: Yes, your Honor, so in which  
16 case, the next point may give you some more solace,  
17 which is that the All Writs Act and the Anti-Injunction  
18 Act, which is 11 U.S.C., Section 105(a), work together  
19 to permit a Federal Court to enjoin state court  
03:22PM 20 proceedings.

21 So, if it really came down to a concern,  
22 those are options. Your Honor referred to post-argument  
23 briefing. We'd be happy to brief that further, but that  
24 is an option for the Court.

25 Finally, in terms of discovery against.

1 New England Compounding, in order to enforce a subpoena  
2 against NECC, someone would need to file a lawsuit to do  
3 that, and that lawsuit would wind up within this Court's  
4 jurisdiction.

5 THE COURT: But, of course, it isn't just  
6 NECC. I don't know the facts well enough, but  
7 presumably there were employees, contractors,  
8 subcontractors, cleaning people, inspectors, all kinds  
9 of people must have been in and out of there, and I  
10 would assume discovery is not limited to the five or six  
11 executives and shareholders and the company itself, and  
12 I'm less sanguine about my ability to control all of  
13 that. What my power is over either the person seeking  
14 the discovery or the witness is not clear to me.

15 What about this issue -- and your brief was  
16 very tempting to me. It appealed, among other things,  
17 to my desire to defer every difficult decision I can  
18 defer --

19 MS. PARKER: Thank you.

20 THE COURT: -- but I wish it were that easy.  
21 You know, basically you say I should deny it without  
22 prejudice, don't address issues of potential  
23 contribution and indemnity. Well, what about the actual  
24 issues of contribution and indemnity? In other words, a  
25 non-NECC party that has already either asserted or

1 attempted to assert a contribution or indemnity claim.  
2 Is that the break point? Once they've done that, do I  
3 now assert jurisdiction over that?

4 MS. PARKER: Yes, your Honor.

5 THE COURT: How do I draw a distinction?

6 MS. PARKER: We would suggest it is a bright  
7 line, that once indemnity or contribution claims are  
8 asserted, then that triggers the Court's "related to"  
9 jurisdiction.

03:24PM

10 THE COURT: All right. Again, presumably  
11 every defendant would have the incentive to do that, I  
12 would think, yes? I mean, I can't imagine what the  
13 disincentive would be.

14 MS. PARKER: I agree with that statement,  
15 your Honor, though I can never read the minds of defense  
16 counsel.

03:25PM

17 I'll also observe that in terms of tools  
18 that are available, New England Compounding -- many of  
19 the plaintiffs in the civil actions that we identified  
20 as a part of our carve-out have also filed separate  
21 cases against New England Compounding that are part of  
22 the MDL, so given that New England Compounding can  
23 assert, as I think your Honor suggested, indemnity  
24 claims in either the MDL action or a separate action,  
25 and that would bring those cases within this Court's



1 jurisdiction as well.

2 So in order to resolve this motion, your  
3 Honor, you need to consider jurisdiction, mandatory  
4 abstention and discretionary abstention. I will address  
5 each of those but only very briefly.

6 In terms of jurisdiction, 28 U.S.C. 1334(b)  
7 gives original but not exclusive jurisdiction over civil  
8 proceedings related to, and we have discussed that I  
9 think ad nauseam today, but I will say that the  
03:26PM 10 plaintiffs' steering committee's case research suggests  
11 that courts almost uniformly hold that a state court  
12 proceeding against a nondebtor unaffiliated with the  
13 debtor -- I'm sorry, courts almost uniformly hold that a  
14 state court proceeding against an entity unaffiliated  
15 with the debtor with only hypothetical contribution and  
16 indemnity claims are outside of the scope of "related  
17 to" jurisdiction.

18 The First Circuit Bankruptcy Appellate Panel  
19 that we cited in our brief considered a similar issue.  
03:26PM 20 Admittedly, as Mr. Molton pointed out, it is not  
21 factually identical, but the First Circuit Bankruptcy  
22 Appellate Panel found an insufficient nexus to confer  
23 "related to" jurisdiction over state court actions  
24 involving nondebtor parties and possible contribution  
25 claims.

1           The Third Circuit in the Pacor test is  
2     important, I think, and bankruptcy attorneys may point  
3     fingers at me, but Pacor is less important for setting a  
4     test here but rather because of what it resulted, what  
5     it concluded, which is that Pacor did not exercise  
6     jurisdiction over potential indemnity claims there.  
7     That Pacor result and the text were both cited favorably  
8     by the Supreme Court in Celotex, and additional cases  
9     since then have cited to that to reach similar  
10    conclusion in the Third Circuit and elsewhere.

03:27PM

11           Twin Labs and Dow Corning appear to us to be  
12    outliers. Twin Labs is a short order with a single  
13    paragraph addressing "related to" jurisdiction that  
14    reaches a conclusion and cites Dow Corning but does not  
15    do any further analysis. Dow Corning applied the Pacor  
16    test and reached a different conclusion than the Pacor  
17    Court did.

18           It's interesting to note there that the  
19    nondebtor entities that were the subject of that order  
20    were other Dow companies in a situation where the debtor  
21    was Dow and those other Dow companies were shareholders  
22    of the Dow debtor, very different factual scenario as  
23    between the relationship of a Virginia pain clinic, for  
24    example, and New England Compounding.

03:28PM

25           On abstention, under 1334(c)(2), which

1 addresses mandatory abstention, the bankruptcy code  
2 provides that the Court must abstain. In certain  
3 circumstances, that evaluation turns on whether claims  
4 left where they are will be timely adjudicated.

5 We would suggest that no one here today has  
6 argued that there will not be timely adjudication if  
7 these cases are left in the state courts. In  
8 particular, we have seen action both by the Federal  
9 Court on remands recently but also in the Tennessee  
10 state court cases that these cases are moving forward.

11 We would suggest that that's another factor  
12 that may counsel in favor of waiting to decide this  
13 issue to determine whether or not there is any reason to  
14 be concerned about the timely adjudication.

15 As to discretionary abstention, there are  
16 over a dozen factors that are considered by courts. We  
17 have gone through, set out some of those in our brief.  
18 I won't go through them all. Some point towards  
19 abstaining, we think, some point against.

20 We would suggest that on the whole, they  
21 suggest that this Court should abstain, but, again, we  
22 urge the Court to refrain from deciding that issue  
23 unless it becomes necessary.

24 Under 1334(b), 46, it says, "An exception to  
25 the mandatory abstention provision that exception

1 applies only to non-core proceedings. The only  
2 exception, the only example of a non-core proceeding  
3 that's given in the bankruptcy code is liquidation or  
4 estimation of contingent or unliquidated personal injury  
5 tort or wrongful death claims against the estate for  
6 purposes of distribution."

7 Now, there's two ways to read that phrase,  
8 and there's been much case law and much academic  
9 discussion about it, but, in any event, the state court  
03:30PM 10 cases are not claims against the estate, nor are they  
11 being made for purposes of distribution of any sort of  
12 plan.

13 Finally, 28 U.S.C., 157(b)(5) says, "The  
14 District Court shall try personal injury and wrongful  
15 death claims." There's no dispute about what that  
16 requires, but that provision cannot create jurisdiction  
17 where jurisdiction has not otherwise been granted by  
18 Congress. Courts have held that that provision  
19 requiring the District Court try personal injury cases  
03:30PM 20 applies only to tort claims that are against the debtor.

21 And a few points in response to the  
22 creditors' committee and the trustee's argument today,  
23 there is no liquidated claim just because there's a \$50  
24 million verdict against a pain clinic in Virginia. They  
25 would have to file a separate action in order to have

1 that become liquidated, which would bring things under  
2 this Court's jurisdiction.

3 While it is noble of Mr. Molton to want to  
4 minimize claims against the estate, I think we all share  
5 that goal in some sense, at least, but I do note that  
6 the right to contribution and indemnification against  
7 NECC exists even if those cases come here.

8 Now, there may be means here where we're  
9 better able and more efficiently able to address those  
03:31PM 10 rights, but they are not erased.

11 THE COURT: Let me ask you, Ms. Parker,  
12 assuming that I get over the abstention hurdle, and  
13 let's just focus on the "related to" jurisdiction point,  
14 is it the committee's view that I do not have "related  
15 to" jurisdiction over potential contribution indemnity  
16 claims, but if, again, assuming the abstention issue is  
17 solved, I could set up a regime where as soon as any  
18 party claimed contribution or indemnity, then  
19 jurisdiction would attach, and I could bring that case  
03:32PM 20 into the court, is that the idea here? I'm struggling  
21 to understand how this would work as a practical matter.

22 MS. PARKER: The short answer, your Honor,  
23 is, yes, that once a claim is asserted against New  
24 England Compounding Company, that those matters would  
25 come before your Honor.

1 THE COURT: All right. Here's what I want  
2 to do. I want to give the stenographer's fingers a  
3 break. I'd like to take a 10-minute break. The people  
4 on the phone should probably stay on the phone. When we  
5 come back, I want to see if Ameridose and GDC want to  
6 weigh in. I think I have a question for either the  
7 trustee or Mr. Molton, and I want to see if the four  
8 people who want to be heard on the phone want to weigh  
9 in briefly as well, and then we need to turn to the  
10 other remaining issues before we run out of time. Let's  
11 take a break of about 10 minutes.

03:33PM

12 THE CLERK: All rise.

13 (A recess was taken.)

14 THE CLERK: All rise. Thank you. Please be  
15 seated.

16 THE COURT: All right. Quickly now, does  
17 Ameridose wish to be heard? Mr. Moriarty.

18 MR. MORIARTY: Your Honor, I don't need to  
19 be heard on the trustees' motion in general.

03:44PM

20 THE COURT: I'm thinking of your related  
21 motions.

22 MR. MORIARTY: The Section 157 motions, I'm  
23 not even sure that Mr. Ellis still sees the issues the  
24 same way today that he did when he filed his briefs in  
25 opposition to that transfer, but let me just say this,

1 that the cases with Ameridose, such as the four  
2 Massachusetts cases and the fifteen New Jersey cases,  
3 whatever that number is, are very different because in  
4 that situation Ameridose is a related entity.

5 The complaints allege that either Ameridose  
6 made the product, or, and/or that they are an alter ego  
7 of NECC, so that's clearly related to, and I don't think  
8 there is a party that has filed a brief that has  
9 contested that issue.

03:45PM

10 I mean, the four Massachusetts cases that  
11 are in the bankruptcy court, even when Mr. Ellis filed  
12 his brief in opposition, he did not contest federal  
13 jurisdiction. That's more of an issue of which Federal  
14 Court in the State of Massachusetts the case belongs,  
15 and we think it's an easy case, as do many others, that  
16 it belongs here. There's no reason to have those four  
17 cases in the bankruptcy court.

18 The New Jersey cases, you know, clearly  
19 that's "related to" jurisdiction, and I can argue the  
20 motion for remand separately if you want, or I can stand  
21 here and talk about it, but we have other grounds  
22 besides Section 157 for those removals and the  
23 opposition to remand in the first place.

03:46PM

24 THE COURT: Okay. All right. Counsel for  
25 GDC. Mr., is it, Thomas?

1 MR. THOMAS: Yes, your Honor. Your Honor, I  
2 actually filed a memorandum in support of the Ameridose  
3 motion. I don't have anything in particular to add to  
4 that. We're basically in the same position, we're a  
5 related entity, and we simply are supporting the  
6 transfer and withdraw the reference. We rely on our  
7 papers.

8 THE COURT: Okay. Thank you. On the  
9 telephone, is Attorney Greg Lyons from Roanoke with us?

03:46PM 10 MR. LYONS: Yes, Judge, I am here.

11 THE COURT: I'll let you say your peace  
12 quickly.

13 MR. LYONS: And I am here, Judge, with my  
14 partner John Lichtenstein, who is on the pleadings in  
15 the case as well. I don't know that we would add very  
16 much more, Judge. The one thing that has been kind of  
17 talked around but maybe not particularly addressed, I  
18 mean, "related to" has certainly been discussed, but how  
19 you decide what is "related to," the Third Circuit, we  
20 think, has articulated a workable basis for that, and we  
21 set that out in our filing, Judge, and we think that  
22 provides a good way for the Court to approach this in  
23 terms of deciding whether "related to" jurisdiction  
24 exists over these matters.

03:47PM 25 The particular matters for which we



1 represent the interveners from the Roanoke area, they  
2 were similarly situated to Mr. Sexton's clients. We  
3 would adopt and agree with Mr. Sexton's arguments, but,  
4 you know, as things stand, Judge, the articulation of  
5 the test by the Third Circuit is one that would, when  
6 applied here, we think, give the Court every reason to  
7 find that there is not "related to" jurisdiction, and we  
8 would urge the Court to do that.

9 THE COURT: All right. Mr. Dean also from  
03:48PM 10 Roanoke, Rob Dean.

11 MR. DEAN: Yes, Judge, Rob Dean with Frith &  
12 Ellerman Law Firm in Roanoke, and I am appearing also on  
13 behalf of the Roanoke plaintiffs who have only filed  
14 cases against the InSight defendants here in Roanoke.

15 I should state that our three cases were  
16 designated on the exhibits to the trustees' motion,  
17 having also included a close affiliate of NECC,  
18 Alaunus Pharmaceuticals.

19 We have since voluntarily dismissed Alaunus  
03:48PM 20 in Federal Court here in Roanoke, and orders have been  
21 granted, and our case is consolidated before  
22 Judge Wilson, and the cases going forward are only  
23 against the InSight defendants.

24 We, again, would join in Mr. Sexton's motion  
25 and the reasons for granting abstention in this case.

1 We would also oppose the trustees' motion.

2 Judge, the only thing we wish to add to your  
3 decision, and we will follow up if given an opportunity  
4 in supplemental briefing before your Honor renders a  
5 decision, is that the balance of equity in this case in  
6 terms of where the proper forum is for discovery, it is  
7 our position that whatever discovery either the InSight  
8 defendants or the plaintiffs seek from NECC or its  
9 employees in Massachusetts will really be attenuated at  
10 best.

03:49PM

11 As Mr. Sexton stated to the Court, those  
12 depositions will likely result in the assertions of  
13 Fifth Amendment privilege. The documents can already be  
14 facilitated through the PSC, and because of that, we ask  
15 that you accept their position as well.

16 Finally, Judge, our cases that have happened  
17 here in Roanoke are really different than how the  
18 creditors' committee is represented to the Court or the  
19 trustee is represented to the Court because unlike what  
20 the creditors' committee counsel have said, that the  
21 goal is to treat all plaintiffs alike and that the  
22 InSight cases shouldn't be the more fortunate victim, if  
23 there is such a thing, the fact is what happened here in  
24 Roanoke is really factually distinct than what happened  
25 around the country.

03:50PM

1           Because unlike the Twin Labs case, which  
2 really involved a chain of distribution, a wholesaler  
3 and a retailer, a debtor and a nondebtor defendant, what  
4 we have against InSight is independently tortious  
5 conduct, where it wasn't so much that the InSight  
6 defendants here in Roanoke were simply selling a Ford  
7 Pinto, and our clients were hurt, what they were doing  
8 is saying they were selling a Mercedes, and as a  
9 consequence of that, really our cases are going to  
03:50PM 10 require extensive discovery involving local employees  
11 and local witnesses and documents that are located in  
12 Roanoke as well.

13           So by consolidating discovery of the other  
14 NECC cases in Massachusetts would make sense, we would  
15 argue that our cases should be allowed to proceed for  
16 pretrial discovery here in Roanoke because this is where  
17 the substance of our claims are located and for the same  
18 reasons that we urge the Court not to find "related to"  
19 jurisdiction, we also urge the Court to abstain from  
03:51PM 20 exercising such jurisdiction over our claims as well,  
21 and we join in the Gentry, Locke motion.

22           THE COURT: Thank you.

23           MR. DEAN: Thank you, Judge.

24           THE COURT: Elliot Olsen from Minneapolis.

25           MR. OLSEN: Thank you, your Honor. I

1 represent Tracy Maccoux. She is one of the personal  
2 injury claimants, and we have commenced a lawsuit  
3 against Medical Advanced Pain Specialists, a pain clinic  
4 here in Minneapolis, and we would oppose the motion, and  
5 we would ask you to abstain from asserting jurisdiction  
6 over this claim.

7 One thing that no one has said yet is in my  
8 case, at least, I think it's speculative to assume that  
9 MAPS is going to pursue contribution from NECC. MAPS  
10 may decide, well, we want to get involved in that  
11 quagmire, that bankruptcy quagmire. We're going to have  
12 to expend a lot of attorney fees, and we may not get  
13 much back in the way of contribution, so, you know, MAPS  
14 may choose to use its resources elsewhere.

15 It may choose to use its resources in simply  
16 defending against this case or trying to settle my case  
17 rather than chasing money that just is very speculative,  
18 especially for those entities that are simply seeking  
19 contribution and don't actually have personal injuries.

20 So I think it's up to MAPS, and I think, at  
21 least at this point, the best solution, at least with  
22 respect to my case, would be for you to deny the motion  
23 without prejudice, as I think you said you were inclined  
24 to do, so that's all I have to add, your Honor, thank  
25 you.

1 THE COURT: Thomas Martin from Philadelphia.

2 MR. MARTIN: Thank you, your Honor. Here  
3 only recently brought to the table, and I think that our  
4 case has a little bit of a different procedural posture  
5 than anything that's been discussed heretofore.

6 THE COURT: Are you with us? I think we  
7 lost him. We'll have to -- all right. Peter, why don't  
8 you see if you can reach him. In the meantime, I had a  
9 question for the trustee or for Mr. Molton. I'm not  
10 sure who's the right person to address it.

03:54PM

11 If I did wind up agreeing with you,  
12 procedurally, how do I transfer the state cases here?  
13 Do I enjoin state courts around the country? Is that my  
14 only vehicle? Mr. Molton.

15 MR. MOLTON: Your Honor, my recollection  
16 from some of the cases I dealt on, if there's a transfer  
17 order, just a simple transfer order that goes to --

18 THE COURT: What authority do I have to  
19 order a Judge in Grand Travers County, Michigan to send  
20 his case to me or her case to me?

03:54PM

21 MR. MOLTON: I think pursuant to 157(b)(5),  
22 according to the courts that have found that to be the  
23 vehicle for such transfer. I don't recall. I mean,  
24 your Honor, I can go back and take a look and see what  
25 Judge Raycroft did and some of the other Judges did in

1 connection with this and get those form of orders to  
2 you, but that's my recollection as I stand here today.  
3 I may be wrong.

4 MS. ANDREWS: Your Honor, excuse me, this is  
5 Anne Andrews. I'm co-chair of the creditors' committee.  
6 I wanted to weigh in on behalf of some victims, but  
7 Mr. Thomas, who actually I argued these motions against  
8 him in another court, knows the exact vehicle where he  
9 brought my cases to that court, so he wanted to address  
10 you.

03:55PM

11 THE COURT: All right.

12 MR. THOMAS: It probably worked only because  
13 it was acceptable to Judge Raycroft that we do it by  
14 this means, but what we did is we filed a motion where  
15 we identified the cases that we believed should be  
16 removed to this Court. He executed the order basically  
17 ordering us to remove those cases that we then filed  
18 notices of removal of the cases in the state courts and  
19 removed them directly to the Federal Court where the  
20 bankruptcy was pending.

03:55PM

21 THE COURT: All right. I'm sorry,  
22 Ms. Andrews, is there something else you wanted to say?

23 MS. ANDREWS: Just two brief comments, your  
24 Honor. Our committee put in papers, and I'm not  
25 addressing you in an official capacity on behalf of the

1 creditors' committee, but as my law firm, Andrews &  
2 Thornton, representing a number of victims, well over  
3 70. I think the count is up to 80 today.

4 The committee, and, in fact, many victims,  
5 victims of our law firm represents central or support  
6 centralization of these cases for a number of reasons.  
7 I won't go over the law, the cases, but I just want to  
8 bring attention to the Court that you've heard from six  
9 different firms now, at least three different states,  
03:56PM 10 and the concern that my clients have and that I have  
11 talked with them, as I know many attorneys have around  
12 the country, that without centralization, I ask your  
13 Honor who, among God's victims of this tragedy, will you  
14 pick to go forward to take from the estate in a way that  
15 will reduce from all of the children of the victims of  
16 this case?

17 And so we're chasing -- centralization stops  
18 that bloodletting of the scarcity, and when we talk  
19 about the Twin Labs, the Ephedrine cases and the  
03:57PM 20 Metabolife cases, where we had Fortune 500 companies, we  
21 had large successful companies that attorneys in this  
22 courtroom now represented there, we do not have that  
23 kind of assets in this case, so for every discovery  
24 order, for every case and for every state, my friend,  
25 Mr. Sexton, who I respect and respect the citizens of

1 the great state of Virginia, I don't see them as more --

2 THE COURT: The Commonwealth.

3 MS. ANDREWS: The Commonwealth, thank you  
4 for reminding me, since I'm from a western state, but  
5 those victims do not deserve more justice than the  
6 victims from all 24 or other states at a time greater or  
7 less than others, and through the vehicle, we support  
8 the trustees' motion, my clients have the same right  
9 from all 12 states we represent them from, to share in  
10 this estate that will waste quickly if this litigation  
11 is not centralized and if all these people are allowed  
12 to go forward for every discovery motion, for every  
13 request in a state court, for every order, there will be  
14 five or six reactive orders, growing and growing the  
15 estate's costs and ultimately ending up in the same  
16 place where the victims will recover in the bankruptcy  
17 court, so we're asking for centralization, we're asking  
18 for and support the trustees' motion and hope that this  
19 case will be centralized quickly.

03:57PM

20 THE COURT: Thank you. Mr. Martin, are you  
21 back on the phone?

03:58PM

22 MR. MARTIN: I am, your Honor. Am I being  
23 heard?

24 THE COURT: Yes.

25 MR. MARTIN: Very quickly, your Honor, we



1 represent Dale Devilli. We filed an action in  
2 New Jersey State Court naming various healthcare  
3 providers as well as Ameridose and other NECC-related  
4 entities. We filed after the bankruptcy, so we did not  
5 name NECC as a defendant.

6 In the notice of removal that Ameridose  
7 filed in New Jersey District Court, they suggested that  
8 the negligence claims against the New Jersey healthcare  
9 providers should be severed, and we frankly think that's  
10 a pretty good idea.

11 The concerns that a number of counsel have  
12 raised about the ability to proceed in these tort  
13 actions we share, and I think that the ability of the  
14 Court to sever the state law actions and remand them  
15 while keeping the NECC-related cases gives the Court the  
16 opportunity to, along with that order, direct that any  
17 discovery directed at NECC-related parties or activities  
18 be subject to the ongoing supervision of that Court.

19 THE COURT: All right. Thank you. Here's  
20 what I'm going to do. I'm going to ask that any party  
21 that wishes to follow up with a post-argument  
22 memorandum, supplemental memorandum may do so. I think  
23 because I can't let this sit very long, I think I'd like  
24 that to be filed why don't we say by Monday of next  
25 week, which is, what, the 20th?

1 THE CLERK: Yes.

2 THE COURT: I'm not going to put a page  
3 limit on it except, again, I'm more likely to read it  
4 carefully the more succinct it is. Don't assume based  
5 on my ignorant questions or anything else I've said that  
6 I'm leaning in any particular direction. There are  
7 strong countervailing issues going both ways here, and  
8 I'm going to make the best decision I can under the  
9 circumstances, but I'll give the parties an opportunity  
10 to file one more round of briefing.

04:01PM

11 Please, while on the subject, and as a  
12 housekeeping matter, we have lots of filings that have  
13 both the MDL number and the Erkan number, which I think  
14 is a mistake at this point. I don't know if I need to  
15 issue an order to clean that up, but things really ought  
16 to be filed in the MDL number that apply to everything.

17 I keep having to go back and forth between  
18 the MDL and the Erkan docket, and Erkan was the first  
19 case, and I issued some orders in that, and, again, if  
20 there's something I need to clean up, I'm prepared to do  
21 that. I want things applying to all cases or of general  
22 significance to be on the MDL docket.

04:01PM

23 MR. MOLTON: Judge, can I add one thing --

24 THE COURT: Yes.

25 MR. MOLTON: -- because I came here to speak

1 about the "related to," and your Honor posed a number of  
2 bankruptcy questions. On the issue of whether the  
3 bankruptcy court does have the authority to subordinate  
4 contribution and indemnity claims --

5 THE COURT: Yes.

6 MR. MOLTON: -- your Honor may want to look  
7 at 510 of the bankruptcy code, which does allow  
8 equitable subordination based on case specific and fact  
9 specific circumstances, and 509(c) that deals with  
10 contribution and indemnification claims.

04:02PM

11 I'm talking about how and when they get  
12 subordinated. I'm sorry I didn't raise that to your  
13 Honor, but I was trying to do my best under  
14 circumstances where, you know, your Honor asked some  
15 questions.

16 THE COURT: Well, that's one of the reasons  
17 I want to allow supplemental briefing, but so the  
18 concept there is it's not necessarily true that every  
19 unsecured creditor has to be treated *pari passu*. There  
20 might be equitable considerations where that is trumped.

04:02PM

21 MR. MOLTON: That's true. That's 510 and  
22 509 deals specifically, your Honor, with indemnification  
23 and indemnity claims under various situations. I know  
24 various circuits deal with that provision differently.  
25 I haven't looked at it recently in the context of the

1 First Circuit, but maybe we'll write about that to your  
2 Honor during that time.

3 THE COURT: All right. Let's take up the  
4 trustee has moved for limited relief from the Court's  
5 order as to the preservation of potential evidence. The  
6 government has filed a response that provides for some  
7 perhaps more elaborate than necessary notice provisions.

8 What I was going to propose is that because  
9 all of this has happened somewhat quickly, I think  
04:03PM 10 within the last day or two, that perhaps the government  
11 and the trustee, see if they can agree on an order. I'm  
12 not sure anyone opposes this. The time hasn't run yet.  
13 Is there anyone who wants to be heard in opposition to  
14 it?

15 At least the general concept is, you know,  
16 to the extent that there is a real estate lease,  
17 equipment lease or whatever, it's theoretically  
18 evidence, on the other hand, it costs money. Is there a  
19 good reason not to or to require the estate to continue  
04:04PM 20 payments on this, or can we let it go?

21 Is there any further evidentiary value to be  
22 had from it? I'm assuming, of course, that anything  
23 that contains information or data like a computer system  
24 has been otherwise preserved. I hope we're talking  
25 about other kinds of equipment.

1 Does anybody want to be heard on that? What  
2 about my idea for the trustee and the government to see  
3 if you can agree? The government's proposed, among  
4 other things, newspaper publication, even though I guess  
5 I'm still a lawyer, does anyone actually read newspaper  
6 publications?

7 MR. SOBOL: Some people read the bankruptcy  
8 code, your Honor.

9 THE COURT: Well, you have to do that. I  
04:05PM 10 suppose some people have to read the newspaper  
11 publications as well, but I certainly don't have a  
12 problem with a notice procedure that's at least, if it  
13 moves expeditiously, to make sure that if there's some,  
14 you know, criminal target or subject, or for that  
15 matter, for anyone else to at least weigh in.

16 Yes, Mr. Cunha.

17 MR. CUNHA: Yes, your Honor, and from the  
18 government's perspective, we're more than happy to work  
19 with the trustee, and our intent in proposing the notice  
04:05PM 20 regime is not to be excessive or unduly burdensome, but  
21 in a belt and suspenders sense to the extent that  
22 there's anyone out there, since the government no longer  
23 has a need to retain these items that might have an  
24 interest or claim, we want to make sure that they have  
25 that opportunity to be heard. There probably is a way

1 short of newspaper publication to do that. We're happy  
2 to work with the trustee.

3 THE COURT: And, again, to the extent -- I  
4 mean, I'm speaking from an old-fashioned perspective,  
5 that computers are separate from other items, and, of  
6 course, almost every item we have nowadays has a  
7 computer chip in it. I don't know what data can be  
8 downloaded from what, but my assumption is that to the  
9 extent that there is data or information that can be  
10 preserved, it will be preserved independent of whatever  
11 these things are.

04:06PM

12 I mean, for all I know, it's the lawn mower.  
13 I don't know necessarily what this equipment is. There  
14 was a schedule filed, but I didn't look at it very  
15 carefully.

16 MR. CUNHA: I'll let the trustee speak more  
17 specifically, but I believe that much of the property,  
18 things like water coolers and postage meters, are  
19 probably wholly irrelevant, and to the extent that there  
20 is some computerized component to something else, my  
21 understanding is that it has been preserved, and our  
22 understanding is that it would be preserved.

04:06PM

23 THE COURT: And I don't know whether people  
24 want an opportunity to photograph things, I don't know  
25 the answer to any of that, but I would expect to grant

1 that motion, and if someone does have an opposition or  
2 wants me to do something different, they should respond  
3 quickly.

4 MR. GOTTFRIED: Your Honor,  
5 Michael Gottfried for the trustee. Two points.  
6 Certainly we're willing to work with the U.S. Attorney's  
7 Office. We certainly conferred with them on several  
8 occasions prior to actually filing our papers and indeed  
9 made several revisions to what we proposed based on  
04:07PM 10 their good input.

11 Second, this is a two-step process, so one  
12 step is to reject the leases; the second step is to get  
13 relief preservation order. Really this motion in front  
14 of you, your Honor, is directed to the second piece,  
15 relief from the preservation order, and I did want to  
16 make the Court aware that some of the lessors have  
17 assented to rejection of the leases, and those motions,  
18 some of them are actually pending in front of  
19 Judge Boroff, and several will be heard tomorrow.

04:07PM 20 All of those motions are subject to the  
21 preservation order, so whatever this Court ultimately  
22 decides with respect to notice and process will not be  
23 affected by whatever Judge Boroff does tomorrow, but I  
24 did want to make you aware of that, your Honor.

25 THE COURT: Thank you. I didn't know the

1 timing of it, but I assumed as much. Again, from my  
2 perspective, if there is an issue, it's preservation.  
3 In other words, you might want to photograph something,  
4 you might want to inspect it, you might want to download  
5 data, but a postage meter, I'm having trouble seeing why  
6 that lease can't be rejected.

7 MR. GOTTFRIED: The trustee agrees with you,  
8 your Honor.

9 THE COURT: All right. The steering  
04:08PM 10 committee's motion to partially lift discovery. I don't  
11 know if it's ripe in the sense that the time for  
12 opposition has run. My instinct certainly is to grant  
13 it, but I obviously want to give parties an opportunity  
14 to address this issue.

15 I know we're still just getting organized,  
16 but I am anxious that every day or week or month that  
17 goes by, discovery is becoming staler, and I would like  
18 the parties who are actually going to litigate the  
19 claims a reasonable opportunity to do so. Mr. Sobol.

04:09PM 20 MR. SOBOL: Yes, your Honor. So, first,  
21 it's my understanding, I'm pretty sure that the time for  
22 filing an opposition expired yesterday.

23 THE COURT: Expired yesterday.

24 MR. SOBOL: Correct.

25 THE COURT: That's right. You said you



1 filed it in time to get the opposition.

2 MR. SOBOL: So it would be dealt with here  
3 today. So the motion is ripe for you to rule on it.  
4 There has been no opposition that has been filed. In  
5 order, and although that's the case, I want to take a  
6 couple of steps back to sort of frame what it is that  
7 the PSC will actually be doing so you can also have a  
8 little bit better understanding of at least a portion of  
9 the case management issues that are attendant to this.

04:09PM

10 First, you'll recall, your Honor, that you  
11 appointed the PSC back in the second week or so of  
12 April. Shortly after that I sat down with the trustee,  
13 Paul Moore. Over the past four weeks or so, we've  
14 established obviously a good working relationship, as  
15 well as some substantive understandings about various  
16 things that are going on that are sort of -- that he's  
17 dealing with and that the PSC will be dealing with, and  
18 that helps understand why it is we've asked for what  
19 we've asked for in the motion and what it is we haven't  
20 asked for, which I wanted to address briefly to you.

04:10PM

21 Again, I'm doing this not because of the  
22 motion itself, but, frankly, there are some important  
23 issues about case management that are going on that I  
24 think it's helpful to air before you.

25 So there are, at least in my understanding,

1 other than NECC or NECP itself, there are three other  
2 levels of actual or potential defendants or  
3 nondefendants, depending upon whether the liability  
4 exists there or not.

5           The other three levels are, first, the NECC  
6 insiders, the Caddens, the Conigliaros, the individuals  
7 who actually own the companies, along with all the  
8 myriad companies that are affiliated with NECC, so that  
9 includes Ameridose and Medical Systems or Sales  
04:11PM 10 Management, Alaunus, GDC, and I think our count total is  
11 about there are actually 19 entities that are in our  
12 view affiliated with NECC which we've shared with  
13 Mr. Moore and Mr. Gottfried to be able to help define  
14 what we understand is that group of actual or potential  
15 defendants.

16           There's then, second, what I call the  
17 national defendants, meaning those companies who were  
18 involved with respect to the allegedly defective  
19 products at a national level, and, therefore, may or may  
04:11PM 20 not be exposed nationally to persons all throughout  
21 wherever the product was distributed.

22           Those might be companies that were involved  
23 in, for instance, the testing, or the creation of the  
24 clean room or who was supposed to be cleaning the clean  
25 room, or what have you, those are people who would

1     theoretically be exposed nationwide, and then finally,  
2     of course, there are the state and localized entities,  
3     which you spent most of your time this afternoon  
4     addressing, essentially clinics, although I recall in  
5     some situations physicians who actually dispensed, and  
6     it would only be liable to a certain group of people who  
7     had actually in some way come in contact with the  
8     product or the product as adulterated or allegedly  
9     adulterated by the clinic.

04:12PM

10                 Now, I set that out because--

11                 THE COURT: Isn't there a fourth category of  
12     people who were on the ground in Massachusetts, for  
13     example, former employees of the company or people who  
14     were subcontractors, contractors, in other words, people  
15     who might not be in the zone of management necessarily  
16     but, nonetheless, might be percipient witnesses?

17                 MR. SOBOL: The answer to that is yes. I  
18     think they come in two varieties. One is I would call  
19     them actually national defendants, although they're from  
20     Massachusetts, if they were involved in the creation of  
21     the product, they could distribute nationwide, then  
22     they're potentially liable nationwide, so I put them in  
23     that bucket.

04:12PM

24                 There's an issue which I'm not addressing  
25     today which is what about other former or current

1 employees but not principals at NECC? Where are they  
2 going to go? Do they have contribution indemnification  
3 claims? Don't they have to be released as a part of a  
4 global settlement? I'm not really addressing that here  
5 today, but you're right to identify that that's out  
6 there.

7 Now, with respect to the NECC and the  
8 NECC-affiliated entities and persons, there has become  
9 an understanding, which is that the trustee is in the  
04:13PM 10 process of trying to undertake what would be a  
11 resolution with all of those persons and entities to  
12 create a pot, which pot eventually would become subject  
13 to a bankruptcy plan and an allocation and a release.

14 Because I've come to an understanding with  
15 Mr. Moore that your negotiation right now is your  
16 negotiation, and when as, and, if appropriate, other  
17 people be brought in, including myself, to make sure  
18 that the settlement is satisfactory or not, that's fine.

19 Obviously in the context of a plan as well,  
04:14PM 20 the creditors' committee would want to know what the  
21 proposed resolution is, the amounts, the basis for it  
22 and sign off on it as well.

23 For the time being, we are hands off. There  
24 are some issues though that are back and forth on that.  
25 So, we've said, we, the PSC has said then we won't take

1 any discovery, we won't racket up any bills with respect  
2 to those entities, we're not interested in doing it, you  
3 stay away from us, you don't take discovery with respect  
4 to us because you don't need any discovery from us,  
5 you're in the middle of a settlement right now, let's  
6 just leave that be as it is, and I'll see how things go.

7           So with respect to taking discovery of those  
8 entities and persons, they're not a subject of the  
9 motion, okay. There may be an issue which I've only  
04:14PM 10 recently brought to their attention, and we're going to  
11 try and work out, which is whether those entities and  
12 individuals we should negotiate a tolling agreement  
13 because there are people who have unfiled cases that are  
14 out there who may feel that they have some reason to  
15 file but who there are lots of reasons why they  
16 shouldn't be forced to file right now for the time  
17 being, and, therefore, from my point of view, at least  
18 as a matter of principle, and I'm just beginning this  
19 negotiation, to find out whether or not a *quid pro quo*  
04:15PM 20 for this hands-off attitude is also that you agree to  
21 some kind of reasonable tolling agreement which we can  
22 work out. That's a part of it.

23           Now, also in the context of so we're not  
24 seeking discovery from those entities, we're going to be  
25 seeking information from everybody else, so from the

1 clinics and from the national defendants, whether they  
2 are defendants here or whether they are nonparties that  
3 have information that relate to this issue because a  
4 part of what the PSC plans to do is to find out the  
5 truth about what it is that happened here, find out what  
6 products were distributed from NECC, when, to whom, what  
7 they did with them and who they distributed them to,  
8 some basic facts about what's out there.

9           During that process, if any of those  
04:16PM 10 national or state-based defendants want to join a  
11 discussion that's happening with the trustee or the PSC  
12 or the creditors' committee with the PSC, then that's  
13 what they'll do, and we'll stand down, but we're going  
14 to go forward with discovery with respect to that.

15           Now, the intention of the PSC is to  
16 undertake this discovery in a judicious manner, meaning  
17 we are not trying to just undertake discovery for  
18 discovery sake. One thing we're trying to be mindful,  
19 for instance, is whether or not any of these defendants  
04:16PM 20 or potential defendants have wasting policies, that we  
21 don't end up wasting the policy or that you know about  
22 it, just like you would in any other tort case, you'd  
23 sort of have to balance what information you have versus  
24 the defense costs that you've racked up, so that will be  
25 a part of what it is that we address as well.

1 I should also be mindful, by the way, that  
2 in the context of the tolling agreement, one other thing  
3 that has begun is a discussion regarding presenting to  
4 this Court an order that to the extent the Federal Court  
5 or this Court has the jurisdiction and the authority to  
6 toll or stay the operation of pre-filing or post-filing  
7 deadlines that are imposed by state law of some sort,  
8 that that might exist, but, obviously, plaintiffs to the  
9 extent they want individual relief and believe that the  
10 Court's in a position to grant it would have to come  
11 forward individually and seek more specific or other  
12 relief, and, similarly, a defendant can come forward  
13 with respect to that.

04:17PM

14 Now, the creditors' committee reviewed the  
15 motion to lift the stay for discovery, raised some of  
16 the issues that I've identified that the PSC has been  
17 addressing. We've come to an understanding that there's  
18 going to be a further dialogue. I've indicated to them  
19 that I'll have a teleconference or a meeting where we  
20 sit down and any further concerns about discovery with  
21 respect to wasting policies, or, you know, making sure  
22 that we get a tolling agreement in place or in the  
23 process of doing that, you know, get the other order in  
24 place I mentioned, that we get those things in place,  
25 and I think there were -- well, we're going to do that.

04:18PM

1 I made a commitment to them I'm going to do  
2 that, that's what we're going to do. We'll have that  
3 meeting, we'll have that dialogue, just to make sure we  
4 get this thing off the ground and running the right way.

5 That's sort of an overview, if you will, of  
6 why it is we're asking for what we want and why we're  
7 not asking for anything further. On this piece of  
8 things, there's some other case management issues I  
9 wanted to address whenever we get to that.

04:18PM

10 On this piece of things, I would just  
11 finally want to add that there was a misstep maybe or a  
12 misunderstanding, which I think is in the process of  
13 being taken care of, but my understanding is about the  
14 scope of who has been in the discussions with Mr. Moore  
15 is based on my discussions with Mr. Moore.

16 I think that he has a pretty firm  
17 understanding about how global his negotiations have  
18 been. I'm not sure whether or not everybody on the  
19 defendant's side, who is within that group, has the same  
20 understandings or not, but that's just a function of  
21 communication, which they'll have, right, and it's  
22 completely understandable in a situation like this.

04:19PM

23 We've got a core group of people who are  
24 trying to have a discussion and working with principals,  
25 but then you have other people that are out there



1 representing entities, and they might have been retained  
2 by insurance companies somewhere, so that's all neither  
3 here nor there. What I'm basically saying is my  
4 statements about my understanding about what's been  
5 going on are from Mr. Moore.

6 There might be some other impressions, but,  
7 frankly, I'm very comfortable that that's going to be  
8 worked out. Now, again, there's other case management  
9 issues at some point, but that sort of deals with  
04:20PM 10 lifting the discovery piece of things for the time  
11 being.

12 THE COURT: All right. Let me pause there.  
13 Does anyone else want to be heard on that topic? Okay.  
14 Hearing nothing, do you want to take up your other case  
15 management issues?

16 MR. SOBOL: Yes, your Honor. Well, the next  
17 case management issue I'd like to address and actually  
18 have Ms. Dougherty address the website, then I would  
19 address a couple other things.

04:20PM 20 THE COURT: All right.

21 MS. DOUGHERTY: Good afternoon, your Honor.  
22 Things are ever changing, noting with the website, we  
23 just got a further e-mail, but we are working on some  
24 way of moving forward in a cost efficient manner in  
25 order to get a website set up for the MDL web page, and

1 the idea was to have that linked with the creditors'  
2 committee website, and so we have had some back and  
3 forth with respect to the content that would be on that  
4 web page and how that would be uploaded and the costs  
5 related to that.

6 There is some concern that the MDL web page  
7 is going to be subject to the control and approval of  
8 the creditors' committee. We've raised that concern.

9 We, as of this morning, were hopeful that  
04:21PM 10 that issue was resolved. We were told it was resolved,  
11 but since we've been sitting here in this courtroom,  
12 I've now seen an additional e-mail stating that that is  
13 not resolved, so we're going to continue to work hard to  
14 get this resolved because we think it's very important  
15 for the victims here to have access not only to the  
16 information related to the bankruptcy but also to the  
17 information related to the MDL procedure, the orders  
18 that you have put in place, eventually access to a  
19 master complaint, to a short form complaint, to a  
04:21PM 20 profile form or fact sheet.

21 All of that information is equally  
22 important, and we want to be able to share that  
23 information. We are asked by the trustee to work with  
24 the creditors' committee to use one website, and we've  
25 been attempting to do so.

1                   Hopefully we can move forward in that this  
2                   is just a bump in the road, and we'll be able to get  
3                   that issue resolved so that the MDL page will have the  
4                   content that is needed without the supervision and  
5                   control and approval of the creditors' committee, and  
6                   if, in fact, we have to get a separate website, you  
7                   know, that will be unfortunate, but we'll do what we  
8                   have to do to make sure that the victims that need  
9                   information related to the MDL proceeding are able to  
10                  get that.

04:22PM

11                   THE COURT:   Okay.   Mr. Sobol.

12                   MR. SOBOL:   I think that the ultimate choice  
13                   that the PSC will have, your Honor, is whether or not we  
14                   bring a matter to your attention that lawyers should be  
15                   embarrassed about.

16                   THE COURT:   If that were the standard, my  
17                   workload would be cut dramatically.   I'll leave it to  
18                   your collective good judgment.

19                   I've said in the past, there's no reflection  
20                   on anymore in this room, I've said that the best  
21                   training for being a Judge is being a parent of teenage  
22                   children because it's often very much an identical  
23                   dynamic, but, you know, in all seriousness, I understand  
24                   you're not going to be able to work everything out.  
25                   Some of that I'm going to work out myself, some of it

04:23PM

1 I'm going to kick to the Magistrate Judge. It depends.  
2 I haven't heard anyone say yet that there's a problem,  
3 at least as to the last couple of issues that require my  
4 immediate attention. I have lots on my plate. If I  
5 have to resolve it, I will, and if I think it's  
6 appropriate for the magistrate, I will send it to her.

7 MR. SOBOL: Fair enough. As a practical  
8 matter, you know, it would be a shame if people couldn't  
9 figure out a way to have one website for the victims in  
10 the case.

11 THE COURT: I don't know what the issues  
12 are. I make no comment.

13 MR. SOBOL: Right. There are other two case  
14 management issues I wanted to address with you, your  
15 Honor. As you can see, the bankruptcy court has under  
16 way some case management on its own, which it's been in  
17 the process of doing.

18 Before this Court, we have the PSC has  
19 circulated a draft, which is very much a DRAFT, I'll put  
20 all caps, bold, italics, underlined, any other font we  
21 can put on it, to whoever is in the MDL who wants to  
22 give comments to it, suggestions, all the rest of that  
23 so that we can get in place something to that effect.

24 THE COURT: I'm sorry, draft case management  
25 order?

1 MR. SOBOL: Yes, case management order, yes.  
2 That essentially is intended, your Honor, to address  
3 some of the items that I've mentioned to you today, you  
4 know, a tolling agreement, the order regarding pre- and  
5 post-filing requirements, some idea about how long this  
6 discovery process is going to be undertaken before we  
7 make a decision whether we're going to fish or cut bait  
8 with those people who want to put money into a pot and  
9 peel off the NECC bankruptcy and whoever wants to  
04:25PM 10 participate in that and find out who wants to be left,  
11 trying to put some timing on those features of things.

12 In broad brush, I don't want to get into  
13 most of the details, but that's essentially what it is  
14 that we're trying to address there.

15 THE COURT: Does it also take up the issue  
16 of master complaints and master answers?

17 MR. SOBOL: It does, it does, so the notion  
18 is the timing of when the master complaint would be  
19 filed, how people would participate into that master  
04:25PM 20 complaint, when answers would be filed. That's all a  
21 part of it.

22 I had been a little bit too hopeful to  
23 actually being able to circulate a draft so that even  
24 the Court might see something right now, but, frankly,  
25 we haven't been able to get our act together enough to

1 be able to do that. We'll do that soon and commit  
2 hopefully to have either an agreed upon case management  
3 order or proposed versions of case management orders  
4 from various constituencies by the next status  
5 conference so that you can have that, your Honor, at  
6 that time.

7           Related to this is that we're going to have  
8 to start a dialogue, and I'm starting a dialogue with  
9 the trustee, and I will with others this week, but in  
04:26PM 10 this situation where we have the bankruptcy court doing  
11 its case management and the District Court doing its  
12 case management, there also needs to be some case  
13 management between this district court and the  
14 bankruptcy court.

15           That's very classic in these kinds of  
16 situations, and sometimes that can remain very informal,  
17 but sometimes aspects of it should be formalized,  
18 sometimes courts do that *sui sponte*, sometimes the  
19 parties come to an understanding, make a proposal,  
04:26PM 20 sometimes they have very different proposals, okay, but  
21 certainly the PSC knows that that's something that needs  
22 to be done.

23           We have our opinions about it. We're going  
24 to try to get and be educated by everybody else, also,  
25 so that in a timely fashion before we have the next

1 status conference, it's ripe for decision or argument,  
2 just like the case management order, that issue in terms  
3 of whether, and, if so, how to address case management  
4 between the bankruptcy court.

5 THE COURT: I think that issue will probably  
6 be relatively easy to resolve one way or the other. I  
7 think Judge Boroff and I, at least in the past, have  
8 seen eye-to-eye, and I think we have a good  
9 relationship, and that's a phone call that's easy to  
04:27PM 10 make, if it comes to that, but I will call him and just  
11 touch the base, which I haven't done in a little while,  
12 and see whether there's anything we need to be paying  
13 attention to from our end.

14 MR. SOBOL: There's also one last issue,  
15 which I'm going to flag to you, but I'm flagging it to  
16 you because if you get an emergency motion tomorrow or  
17 Thursday or Friday, I don't want to have not flagged it  
18 to you today.

19 There is a major concern, your Honor, that I  
04:28PM 20 have, as lead counsel for the plaintiffs' steering  
21 committee, that other people are sending letters to  
22 clinics and other people trying to have a dialogue, a  
23 settlement dialogue, outside of the PSC process, and I'm  
24 trying to find out who got those letters, when they got  
25 the letters, to make sure that actual or potential

1 defendants know your order, which is obviously an effort  
2 to put some kind of cohesiveness on discussions that are  
3 happening by way of settlements.

4 I'm going to continue to try to do that over  
5 the next two days to avoid your intervention, but there  
6 may end up being a situation where I have to file an  
7 emergency motion before you because there are people out  
8 there being confused about who and when and how they  
9 should speak to people about settling or not settling  
10 this case.

04:28PM

11 THE COURT: All right. Does anyone want to  
12 respond to any of that?

13 MR. FERN: Judge, not a way of response but  
14 some additional information the Court might be  
15 interested in. I have seen the draft PMO that the PSC  
16 has drafted. My comments via red line went back to the  
17 PSC yesterday afternoon about 24 hours after I received  
18 them.

19 What has not been spoken about, Judge, in  
20 way of the discovery to be taken of Level II and  
21 Level III defendants, what Mr. Sobol calls the national  
22 defendants or the state specific defendants. What that  
23 bespeaks is some discovery from NECC, documents which  
24 are necessary to identify many of those defendants and  
25 what role they had in way of what they received from

04:29PM



1 NECC or what goods and services NECC received from them.

2           There was an informal discovery that came to  
3 our attention in conjunction with the trustee. We have  
4 negotiated that informal discovery, and my office is  
5 currently in the midst of gathering the documents that  
6 we have agreed to. It will be some time, but we will  
7 produce them on a rolling production as they become  
8 available.

9           Documents that were originally paper  
04:30PM 10 documents and were scanned will be much easier, and they  
11 will be produced first. ESI discovery will come, is  
12 also being processed, and that will come later in the  
13 rolling production.

14           What is necessary that also has not been  
15 spoken of is a protective order. My office drafted a  
16 protective order. It was sent out to the PSC 10 days  
17 ago. Some of that red lines came back to us also in  
18 conjunction with the trustee. The second draft of the  
19 protective order has been circulated among all the other  
04:30PM 20 defendants. I am waiting for their comments back, and  
21 then the next draft will go back to the PSC.

22           It is our intention, Judge, that after that  
23 protective order stipulation is fully negotiated and  
24 completed, we will submit it to the Court to be so  
25 ordered.

1                   So, there are a lot of different maneuvers  
2     and things taking place simultaneously with both the  
3     PSC, with the trustee, with my office and others, so we  
4     are making progress, we are moving forward to get this  
5     case off of first base and moving to a point where we  
6     can get that compensation pool available to the  
7     claimants. Mr. Sobol.

8                   MR. SOBOL: Mr. Fern is absolutely right. I  
9     forgot to mention that there is some informal  
04:31PM 10    discussions that are going on, and he's been very  
11    responsive, as has the trustee, in terms of that  
12    informal discovery, and, yes, one of the other things  
13    with the case management order was also the protective  
14    order issues as well.

15                  THE COURT: Ms. Andrews.

16                  MS. ANDREWS: Yes, your Honor, Anne Andrews  
17    on behalf of the creditors' committee. We are delighted  
18    to hear about the discovery plan and the judicious  
19    words, the word "judicious" used by the steering  
04:32PM 20    committee, and I think I've already said on behalf of my  
21    clients but can say whole-heartedly on behalf of the  
22    creditors' committee how much economy this case requires  
23    and how willing we are to meet and to hone discovery  
24    across the country with the challenge of 79 pain  
25    clinics, and now we're up to 24 states or so.

1           What I want to tell the Court is that the  
2     committee in its work, which we don't often report to  
3     you on this kind of level, but I think it's important  
4     that we do to you today, the committee and its  
5     co-chairs, Mr. Coren, who's in the courtroom today, and  
6     myself and our committee, sent out a letter to each and  
7     every pain clinic as the official creditor group telling  
8     them about the bankruptcy and asking them to contact the  
9     creditors' committee just to dialogue with them about  
10    bankruptcy proceedings.

04:33PM

11           The copy of that letter was attached and has  
12    been circulated. I'll be happy to give a copy of it to  
13    Mr. Sobol if he doesn't have it. He is a member of our  
14    committee. It might have escaped his attention, but we  
15    have an open request for them to contact us as the  
16    creditors' group, something that routinely happens in  
17    every bankruptcy case, and is in no way intended to, as  
18    we get acquainted and work together and will work  
19    together, trip over each other's responsibilities, and  
20    they are responding.

04:33PM

21           There will be at some point a discussion  
22    where all are brought into the room to move this  
23    forward, but, quite frankly, many of them are anxious to  
24    hear from somebody who wanted to tell them about a  
25    bankruptcy so far away that has perhaps so much impact

1 on their clinics and their patients and their presence  
2 in this case without being present, if you will, so with  
3 that I just wanted to let the Court know.

4 THE COURT: All right.

5 MR. MOLTON: Your Honor, just a few things  
6 to end up.

7 THE COURT: Yes.

8 MR. MOLTON: Basically I'm hop-skipping  
9 because part of this deals with status update of the  
04:34PM 10 bankruptcy proceedings. With regard to the website, I  
11 think the parties are working in good faith to get this  
12 done. We're letting the invited, and at Mr. Moore's  
13 request, and basically at our agreement, to let the PSC  
14 basically get on our back with respect to the website.

15 We're working out those protocols. I think  
16 the motion is on tomorrow, and Ms. Dougherty and one of  
17 my partners, Rebecca Fordham, are going to make that  
18 happen, so one way or another, although there are issues  
19 with it, we're seeking to get it done, and I think  
04:34PM 20 everybody is working in good faith, and I wanted to make  
21 that clear.

22 Mr. Sobol referred to Mr. Moore, the  
23 trustee's negotiations with what we call first here  
24 insider defendants. There was a protocol entered  
25 between the committee and the trustee with the

1 committee's consent in the bankruptcy court that  
2 established that protocol, and Mr. Moore has, you know,  
3 as Mr. Sobol aptly and ably described, Mr. Moore is  
4 running that and realizing that creditor and plaintiff  
5 consent is crucial to any agreement going forward at the  
6 appropriate time. He's going to bring us into that  
7 under his discretion and at that time.

8 Mr. Sobol accurately set forth our agreement  
9 regarding the discovery order, and I appreciate that.

04:35PM

10 We've been -- we're taking a look at the CMO, and we're  
11 going to be circulating red line to Mr. Sobol as well on  
12 that and hopefully having discussions among the trustee  
13 ourselves and Mr. Sobol so we can get that all on the  
14 same page.

15 I think Mr. Sobol was correct in noting the  
16 committee's had some concerns about some issues, and we  
17 will be discussing that with him on a going forward  
18 basis and his folks in good faith.

04:36PM

19 Lastly, Ms. Andrews just remarked about the  
20 committee's efforts, and I do want to note, your Honor,  
21 and we understand Mr. Sobol's role in this case,  
22 acknowledge it, and are working with him on it, but one  
23 of the points that we do want to make is, and I'm citing  
24 Collier on this, your Honor, "A committee's role in the  
25 plan process is probably the most important role in any

1 case." It's Collier, 1103.05.

2 Norton, another bankruptcy treaty, 98.34,  
3 the legislative history to Code Section 11028 states  
4 that, "The creditor and equity securities holders  
5 committees -- " there's no equity and securities holders  
6 here -- "will be the primary negotiating body for the  
7 formulization of the plan of reorganization."

8 We're cognizant of your Honor's MDL order,  
9 which basically gave lead counsel various rights and  
04:37PM 10 privileges vis-a-vis settlement. We don't think we're  
11 talking settlement in violation of that order, and what  
12 we are doing, your Honor, is fulfilling our statutory  
13 mandate in terms of talking with various interested  
14 parties since we've been doing since day one of this  
15 case, since January 18th, when we were formed about plan  
16 process, plan protocol and moving this case to a  
17 successful conclusion. Thank you.

18 THE COURT: All right. Without commenting  
19 on the last point, I hope that the parties can work  
04:37PM 20 together, and I hope that turf battles can be kept to a  
21 minimum. Let's leave it at that.

22 Anything else I need to take up? We have, I  
23 think, complaints that haven't been answered yet. I  
24 would propose again to roll that over for the time  
25 being, and I think there may be -- are there motions to

1 dismiss that are in the same category; is that right?  
2 Ms. Parker.

3 MS. PARKER: Yes, your Honor.

4 THE COURT: Rolling over things from one  
5 conference to the other to try to minimize work until we  
6 have a master complaint and so forth in place.

7 MS. PARKER: Yes, your Honor. On Alaunus'  
8 motion to dismiss, I have spoken with Mr. Ciporkin, who  
9 can jump in, of course. As I understand it, they have  
04:38PM 10 agreed to, I think his word was "forbear" the deadlines  
11 on those indefinitely.

12 THE COURT: All right. Again, I do want to  
13 take them, particularly the motion to dismiss, I don't  
14 want to keep saying this, and I keep rolling it over,  
15 but I don't want it to sit indefinitely, I do want to  
16 bring that to a head, so I will do that.

17 Is there anything else other than setting  
18 dates for the next conferences, is there anything else  
19 that anybody wants to bring to my attention?

04:39PM 20 MR. MORIARTY: Yes, your Honor, I have two  
21 things. I'm sorry to go back -- this is Matt Moriarty  
22 for Ameridose -- I'm sorry to circle back to the  
23 removal, New Jersey motions or the remand motions, but  
24 one of the New Jersey lawyers on the phone mentioned  
25 that severance is an option, so I want to address where

1 that really stands in the pecking order.

2 Under 1334 and Section 157, we are confident  
3 that the array of defendants in the New Jersey cases  
4 give you "related to" jurisdiction.

5 NECC is in a number of those cases, if not  
6 all of them. Ameridose is in all of them. Alaunus is  
7 in all or most of them, clearly "related to"  
8 jurisdiction, and under the New Jersey Product Liability  
9 Act, those state court defendants are clearly by  
04:39PM 10 definition not manufacturers or sellers. That's why we  
11 argued fraudulent joinder pretty vigorously at every  
12 level.

13 And, quite frankly, our argument on 157 in  
14 the New Jersey cases is very consistent with the  
15 trustees' motion and even the view taken by the PSC on  
16 these matters because the carve-out that they're urging  
17 only pertain to cases like the Virginia cases, the  
18 Tennessee cases where there are no Tier I, if you will,  
19 defendants, so when we put in there that severance was  
04:40PM 20 an option, it was clearly argued last and meant to be an  
21 option of last resort.

22 Now, that segues into my second point. We  
23 believe pretty strongly in the Section 157 argument for  
24 many reasons and in many levels in what you've heard  
25 today. There is certainly the possibility that you will



1 not agree with the trustee and the creditors' committee  
2 and that those Virginia cases will stay in Roanoke for  
3 ever more.

4 The only thing that I ask is that in many  
5 MDLs where there is state litigation going on with  
6 federal litigation where there may be any overlap  
7 whatsoever in discovery is that you give us some lead  
8 time to quickly put together a coordination order for  
9 submission to you that talks about how potentially we  
10 can reach out to state plaintiffs, state defendants,  
11 possibly ways for you to reach out to state court judges  
12 so that we can promote coordination to the greatest  
13 degree and alleviate some of the concerns that have been  
14 expressed here today.

04:41PM

15 THE COURT: Okay. If we get to that point,  
16 I will certainly take that very seriously.

17 MR. MORIARTY: That's all, thank you.

18 THE COURT: Unless there's anything further,  
19 I think what I'd like to do is to set a -- we might as  
20 well set the next three or so. Peter, is it June 11th?

04:42PM

21 THE CLERK: June 11th at two.

22 THE COURT: June 11th at two. My schedule  
23 is quite constricted going forward, and if some of you  
24 can't make some of these dates with family vacation  
25 plans and so forth, that's going to be hard for me to

1 move them. I certainly don't require the senior most  
2 person to be here at all times, but I propose the next  
3 status for June 11th at two. How about one in mid-July?

4 THE CLERK: July 18th at two.

5 THE COURT: July 18th at two, then  
6 August before I disappear.

7 THE CLERK: August 20th at two.

8 THE COURT: August 9th at two, and to  
9 recap --

04:43PM

10 MR. MORIARTY: I'm sorry, your Honor, to  
11 interrupt, but on July 18th, it's the 10th anniversary  
12 of our firm. There will probably not be any lawyers  
13 available to come. We can send somebody or we can  
14 appear by phone or we can try for the 17th, but --

15 THE COURT: I permit appearances by phone.  
16 I can do July 19th at two, I can do July 17th at three.

17 MR. MORIARTY: If it has to be between the  
18 18th and 19th, let's leave it at the 18th, and we'll do  
19 the best we can.

04:44PM

20 THE COURT: All right. See if one junior  
21 person can remain attentive and stay away from the punch  
22 and the champagne and sit in on the meeting.

23 All right. With regard to the trustee's  
24 motion to transfer and the related motions, motions for  
25 mandatory abstention to withdraw the reference, to

1 remand and so on, those motions are all taken under  
2 advisement. Parties wishing to file may do so by next  
3 Monday, the 20th.

4 The trustee's motion seeking limited relief  
5 as to the preservation order I will grant subject to  
6 further discussion with the government. Hopefully  
7 they'll be an agreed upon proposal. The plaintiffs'  
8 steering committee's motion to partially lift discovery  
9 will be granted, and we will again roll over until the  
10 next status answers to complaints and responses to or  
11 oppositions to Alaunus' motion to dismiss. Next  
12 conference to be June 11th at 2:00.

04:45PM

13 All right. Is there anything else?

14 MR. FERN: Your Honor, just a point of  
15 clarification.

16 THE COURT: Yes.

17 MR. FERN: I heard August 9th and I heard  
18 August 20th.

19 THE COURT: I'm sorry, August 9th.

04:45PM

20 MR. SOBOL: I'm taking the alternate issue  
21 seriously, your Honor, if there's something that myself  
22 or Ms. Parker can't be here, we're just going to --

23 THE COURT: Yes. There is no way between my  
24 schedule and all of your schedules that we can have  
25 perfection where everyone is going to be available all

1 the time. I recognize you all have busy schedules, as I  
2 do, and I'm sure we'll find a way to get through, and  
3 that goes for any of you.

4 You know, I will accept the appearance of a  
5 relatively junior person. I expect that person to be  
6 reasonably well prepared, but I don't need to see the  
7 senior most person with rare exceptions at any of these  
8 conferences. All right. Thank you, all. Thank you for  
9 your appearances and I will see you in about a month.

04:46PM

10 MS. PARKER: Thank you, your Honor.

11 (Whereupon, the hearing was adjourned at  
12 4:46 p.m.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I do hereby certify that the foregoing  
transcript, Pages 1 through 117 inclusive, was recorded  
by me stenographically at the time and place aforesaid  
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING  
PHARMACY CASES LITIGATION and thereafter by me reduced  
to typewriting and is a true and accurate record of the  
proceedings.

Dated this May 17, 2013.

s/s Valerie A. O'Hara

\_\_\_\_\_

VALERIE A. O'HARA

OFFICIAL COURT REPORTER